Where Justice Flows Like Water: The Moon Court's Role in Illuminating Hawai'i Water Law

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I. INTRODUCTION

Dr. Martin Luther King Jr.'s vision of "justice roll[ing] down like waters and righteousness like a mighty stream"[1] captures the essence of the relationship between justice and flowing water in Hawai'i. This observation particularly resonates in an island community where the private diversion of public fresh water resources has created colonial empires, spanned generations, and for many years defied even justice and the rule of law.[2]

In Hawai'i, the flow of fresh water is the lifeblood of natural ecosystems and the human communities that rely on them: ola i ka wai ola, ola ē kua'āina, life through the life-giving waters brings life to the people of the land.[3] According to basic principles of geology and hydrology, water on islands should flow naturally toward the ocean.[4] In many instances throughout Hawai'i's history, however, the flow of water has been directed by political and economic forces, regardless of what the laws or justice required.[5]

Hawai'i has always recognized that fresh water resources are part of a public trust, with the first constitution of the Kingdom of Hawai'i declaring that the land and its resources "belonged to the Chiefs and people in common, of whom

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[1] Martin Luther King, Jr., I've Been to the Mountaintop (Apr. 3, 1968) (quoting *Amos* 5:24), *available at* http://www.afscme.org/about/1549.cfm.

[2] See *infra* Part II for further discussion of the legal and political development of Hawai'i water law.

[3] Kelikokauaikekai Hoe, Kāko'o Ko'olau (unpublished mele composed in 2001) (on file with author).

[4] *See generally* GORDON TRIBBLE, U.S. GEOLOGICAL SURVEY, GROUND WATER ON TROPICAL PACIFIC ISLANDS—UNDERSTANDING A VITAL RESOURCE (2008), *available at* http://pubs.usgs.gov/circ/1312/c1312.pdf.

[5] See *infra* Part II for further discussion of the legal and political development of Hawai'i water law.

[the King] was the head and had the management of landed property."[6] Even after traditional systems of land management were replaced with a Western system of private land ownership via the Māhele,[7] kingdom laws classified water as a resource reserved for the public good.[8] Despite these and other laws, judges often made decisions skewed toward foreign principles that benefitted large agricultural plantations to the detriment of the ecosystems and indigenous communities that relied upon free-flowing streams.[9] That was the state of water law in these islands for many years, until the Hawai'i Supreme Court took up the issue in a series of cases including *McBryde Sugar Co. v. Robinson*,[10] *Robinson v. Ariyoshi*,[11] and *Reppun v. Board of Water Supply*,[12] all under the leadership of the late, great Chief Justice William S. Richardson. Although the Richardson Court settled many outstanding issues, legal and political resistance by entrenched interests persisted.

Under the guidance of Chief Justice Ronald T.Y. Moon, the Hawai'i Supreme Court built upon the Richardson Court's decisions and illuminated Hawai'i water law. The Moon Court wrestled with five major decisions that further refined the legal precepts of water use and management in Hawai'i today. Much of this was accomplished in *In re Water Use Permit Applications (Waiāhole I)*,[13] the first major case to interpret and apply Hawai'i's amended constitution and the State Water Code, Hawai'i Revised Statutes chapter 174C.

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[6] HAW. CONST. of 1840, *reprinted in* FUNDAMENTAL LAW OF HAWAII 3 (Lorrin A. Thurston ed., 1904).

[7] See generally LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? (1992) for a detailed explanation of the Māhele. The Māhele process, which took place between approximately 1845 and 1855, "transformed the traditional Land system from one of communal tenure to private ownership on the capitalist model." *Id.* at 8. For a detailed discussion of Hawaiian land tenure, see also DAVIANNA PŌMAIKA'I MCGREGOR, NĀ KUA'ĀINA: LIVING HAWAIIAN CULTURE 35-40 (2007); Brenton Kamanamaikalani Beamer, Huli Ka Palena (Aug. 2005) (unpublished Master's thesis, University of Hawai'i at Mānoa) (on file with author); Donovan C. Preza, The Empirical Strikes Back: Re-examining Hawaiian Dispossession Resulting From The Mahele of 1848 (May 2010) (unpublished Master's thesis, University of Hawai'i at Mānoa) (on file with author).

[8] Reppun v. Bd. of Water Supply, 65 Haw. 531, 542-45, 656 P.2d 57, 65-67 (1982).

[9] *See* CAROL WILCOX, SUGAR WATER 33 (1996) (acknowledging that "from 1900 to 1959, the Hawaii Supreme Court was composed of lawyers drawn from the prominent business interests whose commercial philosophy they upheld").

[10] See *infra* Part II for further discussion of *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973).

[11] See *infra* Part II for further discussion of *Robinson v. Ariyoshi*, 65 Haw. 641, 658 P.2d 287 (1982).

[12] See *infra* Part II for further discussion of *Reppun v. Board of Water Supply*, 65 Haw. 531, 656 P.2d 57 (1982).

[13] 94 Haw. 97, 9 P.3d 409 (2000). See *infra* Part III.B.1 for further discussion of *Waiāhole I*.

Together with cases from the islands of O'ahu and Moloka'i, three significant themes emerged which encapsulate the Moon Court's contributions to Hawai'i water law: the public trust, indigenous rights, and the courage to uphold the law. Part II provides the necessary cultural and historical context for water in Hawai'i nei, focusing on the Richardson Court's decisions that created a foundation for the Moon Court. Part III explores the Moon Court's major water cases and explains how they shaped water law in Hawai'i today. Part IV delves into the three aspects that define the Moon Court's water law legacy. Through these principles in particular, the Moon Court, with careful attention to the fundamental purposes of Hawai'i water law, enabled justice to flow like water from mauka to makai (from the mountains down to the ocean).[14]

II. WATER'S CULTURAL AND HISTORICAL SIGNIFICANCE IN HAWAI'I NEI[15]

"He Mele No Kāne," an ancient song from the island of Kaua'i, explains in poetic detail that fresh water permeates all aspects of life in Hawai'i.[16] These waters span the horizon from where the sun rises in the East to where it sets in the West.[17] They flow down mountain peaks and over river bottoms, through the sea and above the land in the form of rain, clouds, and rainbows, dwell deep within the earth as aquifers, or bubble up as springs.[18] "He wai e mana, he wai e ola, e ola no eā":[19] it is fresh water that empowers and provides life.

Today, most water management practices no longer reflect the wisdom that enabled Native Hawaiians[20] to thrive in these islands for countless generations; as a result, Hawai'i's water resources and communities have suffered.[21] The waters of life are no longer as abundant as "He Mele Nō Kāne" proclaimed. Most of Hawai'i's streams no longer flow continuously from mauka to makai.[22]

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[14] This article gives particular attention to the intersection between water issues and Native Hawaiian rights and practices, which is one significant area where the Moon Court expanded upon the Richardson Court's legacy.

[15] Some text from this section has previously appeared in D. Kapua'ala Sproat, *Water*, *in* THE VALUE OF HAWAI'I: KNOWING THE PAST, SHAPING THE FUTURE 187, 187-94 (Craig Howes & Jon Osorio eds., 2010).

[16] NATHANIEL B. EMERSON, UNWRITTEN LITERATURE OF HAWAI'I, THE SACRED SONGS OF HULA 257-59 (1964).

[17] *Id.*

[18] *Id.* (excerpts from "He Mele No Kāne").

[19] *Id.* at 258.

[20] In this article, the term "Native Hawaiian," or Kānaka Maoli, refers to individuals able to trace their ancestry to the peoples inhabiting the Hawaiian Islands prior to the arrival of Captain James Cook in 1778, regardless of blood quantum. Both the "N" and the "H" are capitalized (similar to "Native American") to signify that the indigenous people of Hawai'i have a status unique from other inhabitants of these islands.

[21] Sproat, *supra* note 15, at 188.

[22] *See, e.g.*, DELWYN S. OKI, U.S. GEOLOGICAL SURVEY, TRENDS IN STREAMFLOW

Where they still flow, stream and marine ecosystems are often polluted or infested with invasive species that threaten to choke out native wildlife.[23] Meanwhile, ground water supplies that feed nearshore marine ecosystems and provide drinking water for most of Hawai'i's communities have declined in both quantity and quality.[24] Native Hawaiian traditional and customary practices, as well as other local activities dependent on abundant fresh water—including fishing, gathering, and traditional agriculture and aquaculture—have dwindled in that wake.[25]

Native Hawaiians recognized that lush forests and healthy watersheds gathered the rains that fed streams and seeped deep into the earth to recharge drinking water supplies.[26] They appreciated the vital role that fresh water plays—flowing down streams and up as springs, especially in coastal areas—in feeding estuary systems where aquatic and other life can thrive.[27] They

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CHARACTERISTICS AT LONG-TERM GAGING STATIONS, HAWAII 1, 3 (2004), *available at* http://pubs.usgs.gov/sir/2004/5080/pdf/sir20045080.pdf (noting the serious implications of declining surface and ground water levels for long-term drinking water supplies, farmers who rely on these resources, and the habitat available for native stream animals).

[23] Teresa Dawson, *Hawai'i Aquatic Biologists Seek Help Fending Off Marine Invasions*, ENVIRONMENT HAWAI'I, Jan. 2003; DEP'T OF LAND & NATURAL RES., DIV. OF AQUATIC RES., STATE OF HAWAI'I AQUATIC INVASIVE SPECIES MANAGEMENT PLAN (2003), *available at* http://www.anstaskforce.gov/State%20Plans/More/HAWAII%20mgt%20PLAN%2003.pdf. "Today, more than [fifty] species of nonnative invertebrates, reptiles, amphibians and plants are established in Hawaii's streams, reservoirs, and other inland waters." *Id.* at 2-7. Aquatic invasive species cause environmental impacts including "[l]oss of native biodiversity due to invasive species preying upon native species; decreased habitat availability for native species; additional competition; parasites and disease; smothering and overgrowth (leading to loss of key reef building species); genetic dilution; functional changes of freshwater, estuarine, other inland waters, and nearshore marine ecosystems; alterations in nutrient cycling pathways; [and] decreased water quality." *Id.* at 2-1.

[24] *See* OKI, *supra* note 22, at 3.

[25] *See* MCGREGOR, *supra* note 7, at 211; Elizabeth Pa Martin et al., *Cultures in Conflict in Hawai'i: The Law and Politics of Native Hawaiian Water Rights*, 18 U. HAW. L. REV. 71, 72-73 (1996) ("Just as a plant wilts and loses strength in the absence of water, Hawaiian life has suffered as access to water diminished through the dominance of foreign beliefs, values, practices and concepts of private property."); DEP'T OF LAND & NATURAL RES., *supra* note 23, at 2-1 (stating that aquatic invasive species cause significant cultural and traditional impacts, including "competition with native species used in subsistence harvesting; degradation of culturally important habitats (such as Hawaiian fishponds); [and] disintegration of cultural resources (such as Hawaiian fishponds and native Hawaiian habitats) for use with cultural education and practice of traditional knowledge for children and communities").

[26] *See* E.S. CRAIGHILL HANDY & ELIZABETH GREEN HANDY, WITH THE COLLABORATION OF MARY KAWENA PUKUI, NATIVE PLANTERS IN OLD HAWAI'I, THEIR LIFE, LORE, & ENVIRONMENT 63 (4th ed. 1995) [hereinafter HANDY & HANDY].

[27] D. KAPUA'ALA SPROAT, OLA I KA WAI: A LEGAL PRIMER FOR WATER USE AND MANAGEMENT IN HAWAI'I 3 (2009).

Continuous mauka to makai (from the mountains to the ocean) stream flow provided

understood that the cultivation of kalo[28] required an ample supply of fresh water flowing through irrigated terraces and back into streams, and the necessity of this system for the sustenance of the larger community.[29] Water truly provided life for ecosystems and empowered the human communities that depended on them.[30]

Hawaiian laws and customs both prior and subsequent to Western contact reflected these important principles, recognizing that water could not be "owned" in any sense, but instead must be proactively managed as a resource for generations to come.[31] For instance, the 1839 Law Respecting Water for

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> critical fresh water for drinking, supported traditional agriculture and aquaculture, recharged ground water supplies, and sustained productive estuaries and fisheries by both bringing nutrients from the uplands to the sea and providing a travel corridor so that native stream animals could migrate between the streams and ocean and complete their life cycles.

Id. See also CITY & CNTY. OF HONOLULU BD. OF WATER SUPPLY, WATER FOR LIFE, *available at* http://www.boardofwatersupply.com/files/Wfl_Website.pdf (last visited Feb. 25, 2011).

[28] Kalo (Taro, or *Colocasia esculenta*) was the Native Hawaiian staple. *See* HANDY & HANDY, *supra* note 26, at 69-118 (detailing the practices and culture of kalo cultivation in ancient Hawai'i, including the role of kalo and poi in Kānaka Maoli society); *see also* Martin et al., *supra* note 25, at 86-87.

> Taro, a spiritual and nutritional center of Hawaiian culture, was raised by early native planters to a higher state of cultivation than anywhere else in the world. Successful wetland cultivation of taro depends upon steady flows of cool, fresh water. The large-scale taro production necessary to support large pre-contact Hawaiian populations required building and maintaining extensive 'auwai (ditch, canal) systems to effectively distribute the water. The engineering and water management mastery of Hawaiians is renowned, particularly with respect to building and operating flooded terraces, irrigation ditches, and fresh and salt water fishponds. The need for cooperation and for coordination of tasks associated with planting, watering, tending, and harvesting taro shaped relationships between individuals, families, and communities. "The streams and ditches were the regulators, the law givers in the communal relationship—not directly, but because upon their water depended the taro, and upon the taro depended man."

Id. (citations omitted).

[29] *See* HANDY & HANDY, *supra* note 26, at 76-77, 279; *see also* STEPHEN B. GINGERICH ET AL., U.S. GEOLOGICAL SURVEY, WATER USE IN WETLAND KALO CULTIVATION IN HAWAI'I (2007).

[30] D. Kapua'ala Sproat, *From Wai to Kānāwai: Water Law in Hawai'i, in* NATIVE HAWAIIAN LAW (Melody MacKenzie, Susan Serrano & D. Kapua'ala Sproat eds., 2d ed. forthcoming 2013); Martin et al., *supra* note 25, at 87-88 ("Kapu (codes of behavior) ensured that all community members would avoid polluting the streams. Konohiki ensured that all tenants of the ahupua'a enjoyed equal access to water. Disputes over water were rare. . . . [F]or early Hawaiians, principles of property and law were based primarily upon use of land and water, rather than upon concepts of ownership.").

[31] *See, e.g.*, HAW. CONST. of 1840, *reprinted in* FUNDAMENTAL LAW OF HAWAII 3 (Lorrin A. Thurston ed., 1904) (declaring that the land, along with its resources "was not [the King's] private property. It belonged to the Chiefs and people in common, of whom [the King] was the head, and had the management of the landed property."); McBryde Sugar Co. v. Robinson, 54 Haw. 174, 185-87, 504 P.2d 1330, 1338-39 (1973). *See also* SPROAT, *supra* note 27, at 3-7.

Irrigation sought to ensure the equal distribution of resources and "to correct in full all those abuses which men have introduced."[32] It made clear that "it is not the design of this law to withhold unjustly from one, in order to unjustly enrich another";[33] instead, it sought to manage water resources for the common good, even if that meant reallocating water among current users.[34]

The arrival of foreigners to Hawaiian shores and the subsequent decimation of the indigenous population by introduced diseases affected everything in the islands, including the management of water resources.[35] This transformation resulted from numerous developments, including the institution of private property via the Māhele,[36] the subsequent consolidation of land ownership by foreign—and largely American—interests, and the growing recognition that Hawai'i's climate and year-round growing season made plantation agriculture, particularly sugar cane, a lucrative venture.[37]

To establish and expand their businesses, plantation interests constructed massive irrigation systems to transport and use water in ways and locations that nature never intended.[38] Instead of utilizing water within watersheds and allowing the native hydrological system to determine where and how water should flow, plantations radically redirected these systems.[39] To satisfy their thirsty crops, sugar planters constructed ditches that diverted streams from rainy Windward communities predominantly populated by Native Hawaiians to the drier Central and Leeward plains where sugar was cultivated.[40] Wells also

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[32] Hawai'i Kingdom Laws of 1839, *reprinted in* FUNDAMENTAL LAW OF HAWAII, *supra* note 6, at 29.

[33] *Id.* at 30.

[34] *Id.*

[35] *See* O. A. BUSHNELL, THE GIFTS OF CIVILIZATION: GERMS AND GENOCIDE IN HAWAI'I 132-54 (1993) (detailing the impact of foreign diseases on the Native Hawaiian population); *see generally* DAVID E. STANNARD, BEFORE THE HORROR: THE POPULATION OF HAWAI'I ON THE EVE OF WESTERN CONTACT (1989) (same). *See also* SPROAT, *supra* note 27, at 5 (explaining the role of foreigners in changing water management practices in Hawai'i).

[36] *See generally* KAME'ELEIHIWA, *supra* note 7.

[37] *See* WILCOX, *supra* note 9, at 2 ("The sugar industry was the prime force in transforming Hawaii from a traditional, insular, agrarian, and debt-ridden society into a multicultural, cosmopolitan, and prosperous one.").

[38] *See id.* at 5; *see also* CITY & CNTY. OF HONOLULU BD. OF WATER SUPPLY, *supra* note 27 (explaining that the sugar industry created a huge demand for water and that "[d]iverting the water ultimately meant diverting everything").

[39] WILCOX, *supra* note 9, at 29 ("The sugar ditches transported enormous quantities of water permanently out of the streams—and most often out of the watershed as well."); D. Kapua'ala Sproat & Isaac H. Moriwake, *Ke Kalo Pa'a O Waiāhole: Use of the Public Trust as a Tool for Environmental Advocacy*, *in* CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT 247, 251-52 (Clifford Rechtschaffen & Denise Antolini eds., 2007).

[40] WILCOX, *supra* note 9, at 5, 31.

siphoned ground water.[41] Plantation owners often undertook these measures with no consideration of or consultation with the communities that they drastically affected.[42] Water was simply taken, and streams and springs dried up. Impacted communities, both natural and human, were left to live or die with the consequences.[43] This rapid change altered the natural environment and inflicted significant physical and cultural harms on Native Hawaiians, many of which endure to this day.[44] Within a short period, plantations and their irrigation systems took root on each of the major Hawaiian Islands, fundamentally changing the locations and methods of water use for over a century.[45]

Sugar's rise to dominance rewrote the social contract.[46] Plantations used public trust resources for private commercial purposes and, in turn, took over small towns, larger communities, and even whole islands.[47] Plantations were the economy. This economic dominance pervaded government as well.[48] Management practices and even court decisions during the Hawaiian Kingdom and the territorial period reflected increasingly Western notions of private

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[41] *Id.*

[42] *See, e.g.*, Ty P. Kāwika Tengan et al., Report on the Archival, Historical and Archaeological Resources of Nā Wai 'Ehā, Wailuku District, Island of Maui 15-18 (Sept. 2007) (on file with author).

[43] Maka'āinana (people of the land) and others filled Hawaiian-language newspapers at the time with complaints directed at the sugar plantations' devastating impacts on Native Hawaiians and their lifestyles. Sproat, *supra* note 30, at 11. As just one example, S.D. Haku'ole from Kula, Maui lamented:

> DESPAIR! WAILUKU IS BEING DESTROYED BY THE SUGAR PLANTATION—A letter by S.D. Haku'ole, of Kula, Maui arrived at our office, he was declaring that *the land of Wailuku is being lost due to the cultivation of sugarcane.* Furthermore, he states the current condition of once cultivated taro patches being dried up by the foreigners, where they are now planting sugarcane. Also, he fears that *Hawaiians of that place will no longer be able to eat poi,* and that *there will probably only be hard crackers which hurt the teeth when eaten, a cracker to snack on but does not satisfy the hunger of the Hawaiian people.* Although, let it be known that the Hawaiian people were accustomed to eating poi.

Letter from S.D. Hakuole to Nūpepa Kū'oko'a (Jan. 13, 1866) (translated by Hōkūao Pellegrino) (emphases added).

[44] WILCOX, *supra* note 9, at 9-11 (acknowledging that "[o]ne can admire the vision and initiative of the early sugar planters while at the same time mourning the loss of water resources and authentic Hawaiian lifestyle"). *See generally* KAME'ELEIHIWA, *supra* note 7 (detailing cultural harms to Native Hawaiians); JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887, at 44-73, 250-60 (2002) (same).

[45] Sproat, *supra* note 15, at 189-90.

[46] *Id.*

[47] *See* WILCOX, *supra* note 9, at 29.

[48] Sproat & Moriwake, *supra* note 39, at 252.

property.[49] Where once Hawai'i's people respected water as a physical embodiment of Akua Kāne[50] and a fundamental requirement for a balanced and healthy environment, plantation interests reduced water to a mere commodity, sold to the highest bidder with no regard for impacts to the streams or other needs.[51]

Unsurprisingly, conflicts over water ensued, first between plantation interests and Native Hawaiians, and later between competing sugar plantations.[52] The kingdom government created a Commission of Private Ways and Water Rights in 1860 to address water controversies.[53] Initially, a board of three commissioners (two Native Hawaiians and one foreigner) was appointed from each election district within the kingdom to resolve water disputes.[54] Although both the boards and the courts were empowered "to declare and to protect these rights as they existed[] under the ancient Hawaiian customs and regulations," increasingly Western notions of ownership, as opposed to management, constrained their ability to respond to individual cases and reapportion water.[55] Amendments over the years substituted a single commissioner for the boards and altered the appeals process; eventually, in 1907, circuit court judges assumed the boards' duties to maintain the new status quo.[56]

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[49] SPROAT, *supra* note 27, at 6.

[50] Akua Kāne is one of the four principal gods of the Hawaiian pantheon. *See* HANDY & HANDY, *supra* note 26, at 63. Traditional mo'olelo (stories or history) explain that Kāne brought forth fresh water from the earth and traveled throughout the archipelago with Kanaloa creating springs and streams, many of which continue to flow today. *See id.*

[51] Sproat, *supra* note 30; Martin et al., *supra* note 25, at 90-98 (noting that sugar plantations withdrew "unlimited quantities of water regardless of the consequences to the environment and other water users. Euro-American settlers ignored the basic precept that Hawaiians' traditional life support systems depended upon the integrity of ma[u]ka-makai (mountain to sea) resources.").

[52] *See, e.g.*, Territory v. Gay, 31 Haw. 376 (1930); Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., 14 Haw. 50 (1902), *on subsequent appeal*, 15 Haw. 675 (1904); Horner v. Kumuliilii, 10 Haw. 174 (1895); Lonoaea v. Wailuku Sugar Co., 9 Haw. 651 (1895); Peck v. Bailey, 8 Haw. 658 (1867) (denying sugar company's claim to paramount rights to water in the Wailuku (or 'Īao) Stream, holding that both parties were limited to their ancient appurtenant rights to use water for their lands, neither party having any exceptional rights, and further holding that the defendant had the right to use taro water on other lands, limited in quantity to the amount defendant was entitled to use on his taro lands by immemorial usage, provided no injury was done to the water rights of others).

[53] *See* Antonio Perry, *Hawaiian Water Rights*, *in* HAWAIIAN ALMANAC & ANNUAL FOR 1913, at 90, 96-99 (Thomas G. Thrum ed., 1912) (providing an in-depth discussion of the Commission of Private Ways and Water Rights).

[54] *Id.*

[55] *Id.* at 97-98.

[56] *Id.* at 97; HAROLD ANDERSON WADSWORTH, A HISTORICAL SUMMARY OF IRRIGATION IN HAWAII 131 (1933).

After roughly a century of plantation rule, a movement emerged in the 1960s and 1970s to reaffirm public management and control over water resources.[57] One critical stimulus to this movement followed statehood in 1959, when Hawai'i began to select its own judges rather than having them appointed in Washington D.C., which had been the practice while Hawai'i was a territory.[58] Locally appointed judges better understood Hawai'i laws and issues, including native custom and tradition, which provide an important legal foundation for Hawai'i's common law.[59]

Tensions between this foundation of Hawai'i water law and foreign private property concepts came to a head on the island of Kaua'i in *McBryde Sugar Co. v. Robinson*.[60] Two sugar companies litigated their respective rights to take water from the Hanapēpē River.[61] The Hawai'i Supreme Court, led by Chief Justice William S. Richardson, took the occasion in 1973 to address both the bickering between the sugar companies and the larger issue of water management in Hawai'i.[62] The court held that "the right to water is one of the most important usufruct of lands, and it appears clear to us that . . . the right to water was specifically and definitely reserved for the people of Hawaii for their common good in all of the land grants."[63] Although the parties in that case possessed rights to use water, the court declared that they held no ownership interest in the water itself.[64] Rights of water ownership were never included when fee simple title was instituted in Hawai'i.[65] Instead, the court ruled that the sovereign—currently the State of Hawai'i—holds all water in trust for the benefit of the larger community.[66] The sugar companies disagreed and filed multiple appeals in both federal and state court, but those appeals were

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[57] WILCOX, *supra* note 9, at 34 (maintaining that after statehood in 1959, a transformation occurred in the government's priorities for water coinciding with a change in the makeup of the Hawai'i Supreme Court, which was "no longer dominated by justices with interests sympathetic to sugar. The new court shifted its emphasis to acknowledge some basic Hawaiian concepts of water law by way of two landmark cases: McBryde and Reppun."); Martin et al., *supra* note 25, at 105-12.

[58] WILCOX, *supra* note 9, at 34; *see also* Melody MacKenzie & Aviam Soifer, *Introduction* to KA LAMA KŪ O KA NO'EAU: THE STANDING TORCH OF WISDOM: SELECTED OPINIONS OF WILLIAM S. RICHARDSON, CHIEF JUSTICE, HAWAI'I SUPREME COURT, 1966-1982, at vi-vii (2009).

[59] MacKenzie & Soifer, *supra* note 58, at vi-vii; *see also, e.g.*, HAW. REV. STAT. § 1-1 (2009) (adopting English common law except as established by Hawaiian usage).

[60] 54 Haw. 174, 504 P.2d 1330, *aff'd on reh'g*, 55 Haw. 260, 517 P.2d 26 (1973) (per curiam).

[61] *Id.* at 176, 504 P.2d at 1332; *see also* WILCOX, *supra* note 9, at 35.

[62] *McBryde*, 54 Haw. 174, 504 P.2d 1330. Although Justice Abe authored the *McBryde* opinion, Chief Justice Richardson's role and influence in the case was significant.

[63] *Id.* at 186, 504 P.2d at 1338.

[64] *Id.* at 186-87, 504 P.2d at 1338-39.

[65] *Id.*

[66] *Id.* at 186, 504 P.2d at 1338.

ultimately resolved in favor of the State.[67] Resistance to the law nonetheless persisted, and ensuing cases continued the dispute over the nature of water as a public trust.

In *Robinson v. Ariyoshi*,[68] the Hawai'i Supreme Court responded to six questions certified by the Ninth Circuit in appeals related to *McBryde* and made several important clarifications regarding Hawai'i water law, including strongly reaffirming the public trust doctrine's role in both traditional Hawaiian and modern usage. Chief Justice Richardson took the opportunity to delve deeper into the public nature of water resources, explaining that

> a public trust was imposed upon all the waters of the kingdom. That is, we find the public interest in the waters of the kingdom was understood to necessitate a retention of authority and the imposition of a concomitant duty to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses. This is not ownership in the corporeal sense where the State may do with the property as it pleases; rather, we comprehend the nature of the State's ownership as a retention of such authority to assure the continued existence and beneficial application of the resource for the common good.[69]

Robinson underscored that the *McBryde* decision did not depart from settled principles.[70] The case was also instrumental in affirming the role of riparianism[71] in Hawai'i water law.

The 1982 case *Reppun v. Board of Water Supply* involved a dispute over the water in Waihe'e Stream on O'ahu; specifically, the impacts of the City and County of Honolulu Board of Water Supply's wells on the rights of downstream kalo farmers.[72] The court's ruling further clarified the doctrines of appurtenant and riparian rights in Hawai'i, including whether such rights may be transferred or extinguished.[73] The decision also refined the role of

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[67] *See* Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977), *aff'd*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986), *remanded to* 796 F.2d 339 (9th Cir. 1986), *remanded to* 676 F. Supp. 1002 (D. Haw. 1987), *rev'd*, 887 F.2d 215 (9th Cir. 1989); Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982). See also Sproat, *supra* note 30, at 15-16, for a more detailed discussion of the cases.

[68] 65 Haw. 641, 658 P.2d 287.

[69] *Id.* at 674, 658 P.2d at 310.

[70] *Id.* at 676, 658 P.2d at 311-12.

[71] Riparianism is a doctrine of water law premised on the foundational principle that landowners with property abutting a natural watercourse have a right to the reasonable use of the water. *See* Reppun v. Bd. of Water Supply, 65 Haw. 531, 553, 656 P.2d 57, 72 (1982).

[72] *See id.* at 532-38, 656 P.2d at 59-63.

[73] Appurtenant rights appertain or attach to parcels of land that were cultivated, usually in the traditional staple kalo, at the time of the Māhele. *See id.* at 564, 656 P.2d at 78. Riparian rights protect the interests of people who live along the banks of rivers or streams to the reasonable use of water from the stream or river on the riparian land. *See id.* at 563-64, 656

riparianism in local water use and management, especially between competing water uses.[74]

Although the Richardson Court's decisions proved groundbreaking in the area of water resource management, they had far-reaching effects in other areas as well. As Chief Justice Richardson observed,

> Hawai'i has a unique legal system, a system of laws that was originally built on an ancient and traditional culture. While that ancient culture had largely been displaced, nevertheless many of the underlying guiding principles remained. During the years after the illegal overthrow of the Hawaiian Kingdom in 1893 and through Hawai'i's territorial period, the decisions of our highest court[] reflected a primarily Western orientation and sensibility that wasn't a comfortable fit with Hawai'i's indigenous people and its immigrant population. We set about returning control of interpreting the law to those with deep roots in and profound love for Hawai'i. The result can be found in the decisions of our Supreme Court beginning after statehood. Thus, we made a conscious effort to look to Hawaiian custom and tradition . . . and consistent with Hawaiian practice, our court held that beaches were free to all, that access to the mountains and shoreline must be provided to the people, and that water resources could not be privately owned.[75]

Around the same time that the initial stages of the *McBryde* litigation took place, sugar plantations began to close, losing their dominant economic role to tourism and the military.[76] Communities seized this opportunity to reexamine the legal framework for water use and more proactively manage those resources for the benefit of the larger community, rather than for the profit of a handful of private interests.[77] The 1978 Constitutional Convention developed amendments that Hawai'i voters later ratified to enshrine resource protection as a constitutional mandate.[78] Article XI, section 1 of Hawai'i's constitution now declares that

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P.2d at 78-79.

[74] *See generally id.*

[75] MacKenzie & Soifer, *supra* note 58, at vi-vii.

[76] *See* WILCOX, *supra* note 9, at 34 ("As Hawai'i became less and less dependent on the sugar industry as the only source of income, the exclusive power it had enjoyed for decades began to wane."); Kathy E. Ferguson & Phyllis Turnbull, *The Military*, *in* THE VALUE OF HAWAI'I: KNOWING THE PAST, SHAPING THE FUTURE, *supra* note 15, at 47, 47 (noting the U.S. military is the second largest industry in Hawai'i); Ramsay Remigius Mahealani Taum, *Tourism*, *in* THE VALUE OF HAWAI'I: KNOWING THE PAST, SHAPING THE FUTURE, *supra* note 15, at 31, 31 (noting tourism is Hawai'i's primary industry).

[77] Martin et al., *supra* note 25, at 105-12; *see also* Sproat & Moriwake, *supra* note 39, at 251-56.

[78] Martin et al., *supra* note 25, at 105-06 ("The *McBryde* and *Reppun* decisions motivated large water users to vigorously pursue political solutions to restore their visions of an appropriate 'legal' balance. The 1978 Constitutional Convention ("ConCon") provided a forum

> [f]or the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.[79]

Article XI, section 7 articulates the State's "obligation to protect, control and regulate the use of Hawai'i's water resources for the benefit of its people."[80] In 1987, the Legislature enacted Hawai'i's State Water Code, which established a new framework for water resource management that balanced resource protection with reasonable and beneficial use.[81]

III. WATER CASES UNDER CHIEF JUSTICE MOON'S TENURE[82]

Once the state ratified the new constitutional and statutory provisions, community members began to utilize available legal tools to protect and restore their resources. This spawned a series of cases—*Ko'olau Agricultural Co. (Ko'olau Ag)*,[83] *Waiāhole I*[84] and *Waiāhole II*,[85] *In re Wai'ola O Moloka'i, Inc. (Wai'ola)*,[86] and *In re Kukui (Moloka'i), Inc. (Kukui)*[87]—that presented the Moon Court the opportunity to refine water law in Hawai'i and revisit Chief Justice Richardson's rulings in light of Hawai'i's revised framework for water

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for them and for other interest groups seeking to achieve political solutions balancing private and group rights in water."). At the same time, voters also elevated the protection of Native Hawaiian traditional and customary rights to a constitutional mandate. *See* HAW. CONST. art. XII, § 7 ("The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.").

[79] HAW. CONST. art. XI, § 1.

[80] *Id.* art. XI, § 7.

[81] *See* HAW. REV. STAT. ch. 174C (1993 & Supp. 2010). The Code also incorporated public trust principles, clarifying in its opening declaration of policy that "the waters of the State are held for the benefit of the citizens of the State," and that "the people of the State are beneficiaries and have a right to have the waters protected for their use." *Id.* § 174C-2(a) (1993).

[82] Some text from this section originally appeared in previous publications, including Sproat & Moriwake, *supra* note 39, and SPROAT, *supra* note 27.

[83] Ko'olau Agric. Co. v. Comm'n on Water Res. Mgmt. (*Ko'olau Ag*), 83 Haw. 484, 927 P.2d 1367 (1996).

[84] *In re* Water Use Permit Applications (*Waiāhole I*), 94 Haw. 97, 9 P.3d 409 (2000).

[85] *In re* Water Use Permit Applications (*Waiāhole II*), 105 Haw. 1, 93 P.3d 643 (2004).

[86] 103 Haw. 401, 83 P.3d 664 (2004).

[87] 116 Haw. 481, 174 P.3d 320 (2007).

resource management.[88] Together, these cases upheld and further elaborated the public's interest in Hawai'i's water resources, ensuring that they will be managed as a trust for present and future generations.

A. Ko'olau Agricultural Co.

With a brand new Water Code in place, community members began putting this law to work. One initial step was to petition the Commission on Water Resource Management (Water Commission or Commission) to "designate" water management areas (WMAs).[89] Although the Commission is responsible for stewarding all of Hawai'i's water resources, designation is necessary to implement the Code's permitting provisions, which help to control water uses and withdrawals.[90] The Water Code requires designation when water resources are or may become threatened, and the process may be initiated by either the Water Commission or any interested member of the public.[91]

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[88] Justice Paula Nakayama authored the majority of the water law decisions issued by the Moon Court; Chief Justice Moon authored one of the decisions (*Ko'olau Ag*) and joined in the others. Chief Justice Moon's leadership and guidance, however, were undoubtedly instrumental in all the court's cases, including those decisions involving water resources.

[89] HAW. REV. STAT. § 174C-41 (1993). One of the Water Commission's first actions was to initiate a process by which users "declared" current water uses, Martin et al., *supra* note 25, at 139-40, to "gather information about the physical nature (including the quantity and quality) of Hawai'i's water resources and how they are being used." *Id.* at 140. The Code required Commission staff to review the declarations and issue certificates of water use for all reasonable and beneficial uses, which would have priority in resolving claims over water rights and uses. *Id.* at 140-41. Over 7000 declarations were filed with the Water Commission by the 1989 deadline. *Id.* at 141. The Water Commission was unable to meet its own deadline for acting on the individual declarations due to the sheer number filed. *Id.* Facing strong public opposition, the Commission categorized the declarants, "allegedly to facilitate the review and processing of declarations." *Id.* at 141-42. The Commission decided that declarations for instream uses, water rights, and future uses (categories 2 and 3) would not be certified, and in doing so, the Commission created "a subclass of declarants, [mostly Hawaiians,] restricting their access to Water Code proceedings and procedural safeguards, and interfering with the protection of their water uses as the Commission proceeds with allocation of water to others." *Id.* at 143-44. Despite best intentions, very little resulted from this debacle; for more information on the process for filing declarations and certifying water uses, see *id.* at 139-47.

[90] SPROAT, *supra* note 27, at 16.

[91] HAW. REV. STAT. § 174C-41(a)-(b) (Supp. 2010). If the Commission's Chair recommends designation, the Commission must hold a public hearing at a location near the area proposed for designation, and must publish a notice of hearing in a local newspaper. *Id.* § 174C-42. The Commission may also conduct investigations with regard to any proposed designation. *Id.* § 174C-43. In WMAs, the Water Code regulates all consumptive uses of water via water use permits. SPROAT, *supra* note 27, at 17. In contrast, "water rights in non-designated areas are governed by common law." Ko'olau Agric. Co. v. Comm'n on Water Res. Mgmt. (*Ko'olau Ag*), 83 Haw. 484, 491, 927 P.2d 1367, 1374 (1996). So far, all of O'ahu

In December 1988, the Punalu'u Community Association and affected individuals George Fukumitsu, Charles Reppun, and John L. Reppun, represented by the public interest litigation firm Sierra Club Legal Defense Fund,[92] filed a petition with the Water Commission to designate five Windward O'ahu aquifers as ground water management areas (GWMAs).[93] The Water Commission unanimously granted the petition, designating the Kawailoa, Ko'olauloa, Kahana, Ko'olaupoko, and Waimānalo aquifers as GWMAs on July 15, 1992.[94]

Unsure of how to appeal the Commission's decision, Ko'olau Agriculture Co., Ltd. (Ko'olau Ag)[95] challenged the designations by filing three duplicative

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except Wai'anae, the whole island of Moloka'i, and the 'Īao aquifer on Maui have been designated as GWMAs. In April 2008, the Water Commission designated Nā Wai 'Ehā, Maui the first Surface Water Management Area (SWMA) in the history of the Water Code. SPROAT, *supra* note 27, at 17. The Code articulates specific criteria for surface and ground water management area designation. HAW. REV. STAT. §§ 174C-44 to -45 (Supp. 2010).

[92] The Sierra Club Legal Defense Fund (SCLDF) was established in 1971. *About Us*, EARTHJUSTICE, http://www.earthjustice.org/about (last visited Feb. 25, 2011). In 1997, it changed its name to Earthjustice, but continues to operate as a "non-profit public interest law firm dedicated to protecting the magnificent places, natural resources, and wildlife of this earth, and to defending the right of all people to a healthy environment." *Id.* In this case, Earthjustice (then, SCLDF) represented community groups and individuals who lived in the impacted areas and relied on the affected ground water for a range of community uses. Interview with Lea Hong, Dir., Trust for Public Lands Hawaiian Islands Program and former SCLDF attorney, in Honolulu, Haw. (Mar. 28, 2011). The Punalu'u Community Association is a community group that is working within the Punalu'u Watershed Alliance (including Kamehameha Schools, the Honolulu Board of Water Supply, the U.S. Geological Service, and the State Commission on Water Resource Management). CITY & CNTY. OF HONOLULU BD. OF WATER SUPPLY, Ko'olau Loa Community Input, *available at* http://www.boardofwatersupply.com/cssweb/display.cfm?sid=1409 (last visited Mar. 26, 2011). The Alliance's goal is to set the instream flow standard for Punalu'u Stream, address on-going and future use of surface water and groundwater, and conduct watershed management for Punalu'u. *Id.* The group meets regularly to discuss current projects and issues. *Id.*

[93] *Ko'olau Ag*, 83 Haw. at 486-87, 927 P.2d at 1369-70.

[94] *Id.* at 487, 927 P.2d at 1370. This decision followed several public hearings and deferrals for further investigation. *Id.* A special meeting was held on May 5, 1992 at which Ko'olau Agricultural Co. (Ko'olau Ag) appeared and submitted testimony. *Id.* At that meeting, the Commission staff submitted an amended report that recommended the designation of all five aquifer systems. *Id.* Thereafter, the Commission voted unanimously to designate all five aquifer systems as WMAs. *Id.*

[95] Ko'olau Ag is a Hawai'i corporation, run by Valerie Trotter, wife of James Campbell (of the Campbell Estate). *See* Jim Dooley, *Campbell Estate Heir Files for Bankruptcy*, HONOLULU ADVERTISER, Apr. 29, 2003, *available at* http://the.honoluluadvertiser.com/article/2003/Apr/29/ln/ln10a.html. Ko'olau Ag operated with the purpose of developing water resources in Punalu'u Valley on the Windward side of O'ahu. *Id.*

actions on August 17, 1992.[96] Ultimately, the courts dismissed two of the three appeals for lack of jurisdiction, and only a complaint for declaratory and injunctive relief was left pending with the circuit court.[97] In August 1994, the court granted the Water Commission's motion to dismiss Ko'olau Ag's claims, and the matter was appealed.[98] This case, therefore, determined the appropriate method to challenge a WMA designation,[99] due to the Code's "fail[ure] to specify explicitly how, and to which court, an appeal from a WMA designation may be taken."[100]

At the outset, the Moon Court acknowledged the Code's complex regulatory framework and "bifurcated system of water rights."[101] "In WMAs, the permitting provisions of the Code prevail; water rights in non-designated areas are governed by the common law."[102] Although it acknowledged "the uncertainty caused by [the] inartful drafting of the Code[,]"[103] the court deferred to the agency: "The Commission, by virtue of its agency expertise, is certainly in a better position than the courts to evaluate 'scientific investigations and research' to determine whether a water resource 'may be threatened by existing or proposed withdrawals and diversions of water.'"[104] The Moon Court upheld the lower court's ruling, having been "persuaded by the language and structure of the Code that the legislature did not intend that a designation decision may be challenged by way of a declaratory judgment action."[105] Ultimately, the Moon Court held that "a WMA designation is not judicially reviewable."[106] "[U]nless the legislature 'specifically provide[s]' for an appeal, the Commission has 'exclusive jurisdiction and final authority' over a WMA designation, which is indisputably a 'matter relating to implementation and administration of the state water code.'"[107]

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[96] *Ko'olau Ag*, 83 Haw. at 487, 927 P.2d at 1370. Ko'olau Ag filed (1) a complaint for declaratory and injunctive relief with the circuit court; (2) a direct appeal to the Hawai'i Supreme Court; and (3) an administrative appeal to the circuit court. *Id.* The Hawai'i Supreme Court dismissed the direct appeal for lack of jurisdiction because it was not timely filed. *Id.*; *see also* Ko'olau Agric. Co. v. Comm'n on Water Res. Mgmt., 76 Haw. 37, 868 P.2d 455 (1994). Ko'olau Ag later "stipulated to dismiss its appeal to the circuit court, leaving only the instant declaratory judgment action unresolved." *Ko'olau Ag*, 83 Haw. at 487, 927 P.2d at 1370.

[97] *Ko'olau Ag*, 83 Haw. at 487, 927 P.2d at 1370.

[98] *Id.*

[99] *Id.* at 487-88, 927 P.2d at 1370-71.

[100] *Id.* at 489, 927 P.2d at 1372.

[101] *Id.* at 491, 927 P.2d at 1374.

[102] *Id.*

[103] *Id.* at 489, 927 P.2d at 1372.

[104] *Id.* at 493, 927 P.2d at 1376.

[105] *Id.* at 495, 927 P.2d at 1378.

[106] *Id.* at 493, 927 P.2d at 1376.

[107] *Id.* The court did acknowledge that the Commission's erroneous refusal to designate a WMA would breach its constitutional and statutory duties and may be reviewable via

At first blush, *Ko'olau Ag* may appear to address peripheral procedural issues. Closer examination, however, reveals that the case was critical in upholding the Code's new framework for water resource management and the Commission's first, formative step toward implementing that framework. Where the Commission took the initial procedural action to protect water resources, the Moon Court respected and upheld the Commission's "'exclusive jurisdiction and final authority'" in taking such action.[108] Had the court overturned the Commission's decision, it would have stymied the Commission's regulatory role and undermined the Code's foundation for water resource management at the outset.

The cases that ensued further addressed the Code's management framework and delved into more substantive issues. This presented both the Water Commission and the Moon Court with the opportunity to shape the future of water management and allocation in Hawai'i nei.

B. The Waiāhole Decisions

The Waiāhole decisions offered the Moon Court its first opportunity to grapple with the inherent nature of Hawai'i's water resources: whether they would be managed as a public trust or continue to be hoarded as private commodities. The new constitutional and statutory provisions faced off against plantation-era water politics in what was the biggest battle over water in Hawai'i's recent history.

The Waiāhole Ditch stretches from Kahana Valley all the way to Kahalu'u on O'ahu's Windward side.[109] Since it was constructed in the early 1900s, that system has taken roughly 27 million gallons of water each day (mgd) from Windward streams and communities, through the Ko'olau mountains, to the Central plain where it was used primarily for sugar.[110] The streams diverted by the Waiāhole Ditch provide the major source of fresh water to support native stream life, enable traditional agriculture and aquaculture including lo'i kalo (wetland kalo cultivation),[111] sustain productive estuaries and fisheries, and nourish many other public trust purposes and community uses on the

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mandamus. *Id.* at 494, 927 P.2d at 1377.

[108] *Id.* at 493, 927 P.2d at 1376 (quoting HAW. REV. STAT. § 174C-7(a) (1993)).

[109] *Waiāhole I*, 94 Haw. 97, 111, 9 P.3d 409, 423 (2000).

[110] *Chronology of Waiahole Ditch*, ENVIRONMENT HAWAI'I, Nov. 2000, http://www.environment-hawaii.org/members_archives/archives_more.php?id=653_0_24_0_C; *see also* WILCOX, *supra* note 9, at 98-108.

[111] Lo'i kalo refers to the wetland cultivation of the staple crop kalo (taro, or *Colocasia esculenta*), which was traditionally raised in irrigated paddies. *See* HANDY & HANDY, *supra* note 26, at 69-118 (detailing the practices and culture of kalo cultivation in ancient Hawai'i, including the role of kalo and poi in Kānaka Maoli society).

Windward side.[112] Yet, for roughly 100 years, those streams have been diverted to subsidize agriculture on O'ahu's Central plain to the detriment of Windward needs and uses.[113]

In 1993, shortly after the areas surrounding the Waiāhole Ditch were designated as GWMAs, and that decision was upheld in *Ko'olau Ag*,[114] O'ahu Sugar announced that it would be closing.[115] A coalition of Windward interests including Native Hawaiians and small family farmers (Waiāhole-Waikāne Community Association,[116] Hakipu'u 'Ohana,[117] and Ka Lāhui Hawai'i[118] (collectively, the Windward Parties)), represented by pro bono attorneys including the public interest litigation firms Earthjustice[119] and the Native Hawaiian Legal Corporation (NHLC),[120] petitioned for the return of all water diverted by the ditch system to the Windward streams.[121]

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[112] *Waiāhole I*, 94 Haw. at 111, 9 P.3d at 423.

[113] *Chronology of Waiahole Ditch*, *supra* note 110.

[114] *See generally* Ko'olau Agric. Co. v. Comm'n on Water Res. Mgmt. (*Ko'olau Ag*), 83 Haw. 484, 927 P.2d 1367 (1996).

[115] *Chronology of Waiahole Ditch*, *supra* note 110; *see also* WILCOX, *supra* note 9, at 98-108.

[116] Waiāhole-Waikāne Community Association is a grassroots group comprised of residents from the Waiāhole and Waikāne areas of Windward O'ahu who sought the restoration of streams to revive the native stream and estuary ecosystem and the Native Hawaiian and other community uses they once supported. Sproat & Moriwake, *supra* note 39, at 257.

[117] Hakipu'u 'Ohana is a family-based hui (group) from the Hakipu'u area of Windward O'ahu that has been engaged in a range of Native Hawaiian and cultural issues, including the restoration of water diverted by the Waiāhole Ditch System. Interview with Kahikūkalā Hoe, Hakipu'u 'Ohana member, in Honolulu, Haw. (Dec. 15, 2010). Hakipu'u 'Ohana is one of the original petitioners in the Waiāhole case. *Id.*

[118] Ka Lāhui Hawai'i is one of the first groups organized to advocate for and model Hawaiian sovereignty. Sproat & Moriwake, *supra* note 39, at 257. Ka Lāhui was one of the original groups who petitioned to restore Windward streams and communities. *Id.*

[119] *See supra* note 92 (explaining what Earthjustice is).

[120] NHLC is Hawai'i's only non-profit, public interest law firm focused solely on Native Hawaiian law. *About the Native Hawaiian Legal Corporation*, NATIVE HAWAIIAN LEGAL CORPORATION, http://www.nhlchi.org/about-us (last visited Feb. 25, 2011). NHLC provides legal assistance to families and communities engaged in perpetuating the culture and traditions of Hawai'i's indigenous people. *Id.*

[121] The Windward Parties, joined by OHA, petitioned to restore stream flow by amending the Interim Instream Flow Standards (IIFSs) for the Windward O'ahu streams affected by the Waiāhole Ditch System. *Waiāhole I*, 94 Haw. 97, 112, 9 P.3d 409, 424 (2000). An IIFS is the minimum amount of water that must remain in a stream or a given reach of a stream to support beneficial instream uses, such as environmental protection or traditional and customary Native Hawaiian practices. HAW. REV. STAT. § 174C-3 (1993). IIFSs and permanent instream flow standards "are the Water Commission's principal mechanisms to ensure that surface water rights and interests, including resource protection, are adequately considered." SPROAT, *supra* note 27, at 22. The Water Code required the establishment and administration of an "instream use protection program" when the Water Code was passed in 1987; however, the only standards that

Nearly twenty other parties wanted Windward water to continue going to the Central and Leeward plains; most of these parties sought permits for large-scale agricultural and urban development.[122] A wide range of interests filed water use permit applications[123] or supported the continued diversion of water, including county, state, and federal entities as well as some of the most powerful private interests in Hawai'i.[124] With the exception of the Windward Parties, the Office of Hawaiian Affairs (OHA), and the Department of Hawaiian Home Lands (DHHL), all opposed the restoration of Windward streams and communities.[125]

After months of contested case hearings, in December 1997 the Water Commission issued a decision dividing the water between Windward streams and Central/Leeward users.[126] For the first time in Hawai'i's history, the Commission ordered the ditch operator to restore water that had been taken for plantation agriculture to the streams of origin.[127]

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are based on some actual information (as opposed to the status quo) have been set as a result of litigation, with the first such standards established in *Waiāhole*. *See* HAW. REV. STAT. § 174C-71 (1993) (detailing the requirements of the instream use protection program).

[122] In *Waiāhole I*, the petitions to amend the interim instream flows and water use permit applications in that case collectively exceeded the entire flow of the ditch system. *Waiāhole I*, 94 Haw. at 111-12, 9 P.3d at 423-24.

[123] The Water Code requires a water use permit for any consumptive use of water within a designated WMA, with some limited exceptions. HAW. REV. STAT. § 174C-48(a) (1993). Practically speaking, water use permits are the Commission's administrative tool to regulate how and where water is used. *See* SPROAT, *supra* note 27, at 16-19 (detailing the purpose and requirements of designation and water use permits); *see also infra* Part III.A (same).

[124] Interested entities included the Office of Hawaiian Affairs, Kamehameha Schools (then called Bishop Estate), James Campbell Estate, Robinson Estate, Amfac and its subsidiary the Waiāhole Irrigation Company, City and County of Honolulu Board of Water Supply, Hawai'i Department of Agriculture, Hawai'i Department of Hawaiian Home Lands, Hawai'i Department of Land and Natural Resources (DLNR), and the United States Navy. *Waiāhole I*, 94 Haw. at 110-11, 9 P.3d at 422-23.

[125] The appearance of DLNR, which officially opposed restoring stream flow, raised a major procedural issue, because the Water Commission is administratively housed within DLNR, and directed by the same official who chairs the Department. Ultimately, the Hawai'i Supreme Court noted the conflict, but deemed any error waived or excused by the "rule of necessity." *Id.* at 123-24, 9 P.3d at 435-36.

[126] *Id.* at 113, 9 P.3d at 425.

[127] *See id.* at 97, 9 P.3d at 409. In this initial decision, the Water Commission assigned 14.03 mgd of the total 27 mgd to Leeward users and "system losses" and released 12.97 mgd into Windward streams. *Id.* at 118, 9 P.3d at 430. However, 6.97 mgd of the 12.97 mgd released into the Windward streams remained available for Leeward offstream uses as a "proposed agricultural reserve" and "non-permitted ground water buffer." *Id.* Although the Commission increased the IIFS of Waiāhole and Waianu streams to 10.4 mgd, it neither mentioned nor made any provision for Waikāne Stream's IIFS. *Id.* at 117, 9 P.3d at 429.

No one was completely satisfied with the Commission's decision, and it was appealed to the Hawai'i Supreme Court.[128] This case of "unprecedented size, duration, and complexity" was the first time that the Moon Court reviewed various provisions of the constitution and Water Code, including the standards for water use permits and interim instream flow standards (IIFSs).[129] The Windward Parties argued—and the Moon Court eventually agreed—that not enough water had been restored to the streams, while Central/Leeward interests complained that too much water had been returned.[130]

In August 2000, the Moon Court issued a landmark decision in that appeal.[131] Although the court acknowledged the Commission's efforts at water conservation, it went further to ensure that Hawai'i's streams receive the protection that the law requires.[132] Upon review, the court found much of the Commission's decision unsupported by the evidence and in violation of the State Water Code.[133] The court ordered the Commission to reconsider the amount of water the Windward streams need to support native stream life and community uses, vacated permits the Commission had issued to Leeward interests, and required the Commission to make a new decision on the permits that followed from the evidence.[134] In sum, the court decided most of the issues, but sent seven back to the Commission for more work.[135] The court's 2000 decision strongly reaffirmed several important principles, especially regarding the relationship between water and Native Hawaiian issues.

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[128] *Id.* at 118, 9 P.3d at 430; *see also* Sproat & Moriwake, *supra* note 39, at 259-60.

[129] *Waiāhole I*, 94 Haw. at 118, 9 P.3d at 430; *see supra* note 121 (defining IIFS).

[130] *Waiāhole I*, 94 Haw. at 147, 9 P.3d at 459.

[131] *See generally id.*

[132] *See id.*

[133] *Id.* at 148, 9 P.3d at 460 (pointing out that the Water Commission's analysis "misconstrues the Code's framework for water resource management").

[134] *Id.* at 189, 9 P.3d at 501.

[135] In *Waiāhole I*, the court vacated the Commission's initial decision in part, remanding seven issues for further hearings:

> (1) the designation of an interim instream flow standard for windward streams based on the best information available, as well as the specific apportionment of any flows allocated or otherwise released to the windward streams; (2) the merits of the petition to amend the interim standard for Waikāne Stream; (3) the actual need for 2,500 gallons per acre per day over all acres in diversified agriculture; (4) the actual needs of Field Nos. 146 and 166 (ICI Seeds) and Field Nos. 115, 116, 145, and 161 (Gentry and Cozzens); (5) the practicability of Campbell Estate and PMI using alternative ground water sources; (6) practicable measures to mitigate the impact of variable offstream demand on the streams; and (7) the merits of the permit application for ditch "system losses."

Id. (internal citations and formatting omitted). The court affirmed "all other aspects of the Commission's decision not otherwise addressed." *Id.* at 190, 9 P.3d at 502.

1. Waiāhole I

a. The public trust doctrine

The Moon Court strongly reaffirmed that Hawai'i law has always and continues to recognize the "public trust doctrine," which mandates that all waters are held in trust for all of the State's citizens.[136] The court noted that this doctrine is so important that even the Legislature cannot abolish it and upheld the independent validity of the public trust, ruling that article XI, sections 1 and 7 of Hawai'i's constitution "adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai'i."[137] Therefore, the Water Code supplements, not supplants, the public trust doctrine's protections.[138]

The court next addressed the scope and substance of the trust, holding that the public trust applies to all water resources without exception or distinction between surface and ground water.[139] "The public trust [possesses] a dual concept of sovereign right[s] and responsibilit[ies]."[140] Thus, the purposes of the trust have evolved from the traditional public rights of navigation, commerce, fishing, recreational uses, and scenic viewing, to include resource protection as an important underlying responsibility of the trust.[141]

In response to arguments that stream water would be better utilized by offstream users, the Moon Court acknowledged the public interest in free-flowing streams and specifically dispelled any argument that the "retention of waters in their natural state" constitutes "waste."[142] The court also recognized the exercise of Native Hawaiian and traditional and customary rights,[143]

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[136] *Id.* at 131-32, 9 P.3d at 443-44.

[137] *Id.* at 132, 9 P.3d at 444.

[138] *Id.* at 133, 9 P.3d at 445.

[139] *Id.*

[140] *Id.* at 135, 9 P.3d at 447.

[141] *Id.* at 136, 9 P.3d at 448.

[142] *Id.* at 136-37, 9 P.3d at 448-49.

[143] Native Hawaiian traditional and customary rights include "all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778[.]" HAW. CONST. art. XII, § 7; Ka Pa'akai O Ka 'Aina v. Land Use Comm'n, 94 Haw. 31, 46-47, 7 P.3d 1068, 1083-84 (2000) (ruling that to effectuate the State of Hawai'i's "obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private interests" in the context of the Land Use Commission's review of a petition for reclassification of district boundaries, the State must, at a minimum, make specific findings and conclusions regarding: "(1) the identity and scope of 'valued cultural, historical, or natural resources' in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be

appurtenant rights,[144] resource protection, and domestic water uses[145] as public trust purposes.[146] Importantly, public trust purposes have priority over other types of uses.[147]

The court made clear that private commercial uses are not public trust purposes: "the public trust has never been understood to safeguard rights of exclusive use for private commercial gain."[148] After considering all of the various public trust purposes, the court overruled the Commission's conclusion that the public trust establishes resource protection as "a categorical imperative and the precondition to all subsequent considerations."[149] Instead, the court held that the Commission "must inevitably weigh competing public and private water uses on a case-by-case basis," but that any balancing must "begin with a presumption in favor of public access, use, and enjoyment."[150]

Under the public trust, the state has a dual mandate of protection and maximum reasonable-beneficial use, which prescribes a higher level of scrutiny for private commercial uses.[151] Therefore, the doctrine requires close scrutiny of any requests by private interests to use public resources for private gain to ensure that the public interest in the resource is fully protected.[152]

After considering the basic principles of statutory construction and the Water Code's declaration of policy, the Moon Court also ruled that the Code provides for a public trust "essentially identical to the previously outlined dual mandate of protection and 'conservation'-minded use, under which resource 'protection,' 'maintenance,' and 'preservation and enhancement' receive special consideration or scrutiny, but not a categorical priority."[153]

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affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the [Land Use Commission] to reasonably protect native Hawaiian rights if they are found to exist."); *see also* HAW. REV. STAT. § 174C-101 (1993) (describing Native Hawaiian water rights).

[144] *See supra* note 73 (defining appurtenant rights).

[145] HAW. REV. STAT. § 174C-3 (1993) (defining a domestic water use as "any use of water for individual personal needs and for household purposes such as drinking, bathing, heating, cooking, noncommercial gardening, and sanitation"). The Water Code separately defines municipal water services provided by a county or Board of Water Supply. *Id.*

[146] *Waiāhole I*, 94 Haw. at 136-37, 9 P.3d at 448-49.

[147] *Id.* at 137, 9 P.3d at 449.

[148] *Id.* at 138, 9 P.3d at 450.

[149] *Id.* at 142, 9 P.3d at 454.

[150] *Id.*

[151] *Id.*

[152] *See id.*

[153] *Id.* at 146, 9 P.3d at 458. In its 1997 Final Decision and Order, the Water Commission concluded that its "duty to protect public water resources is a categorical imperative and the precondition to all subsequent considerations[.]" *Id.* at 113, 9 P.3d at 425. The Moon Court overruled that conclusion, holding "that the Commission inevitably must weigh competing public and private water uses on a case-by-case basis, according to any appropriate standards

b. The precautionary principle

In addition to the public trust, the court also discussed the "precautionary principle."[154] The Commission adopted this tenet in its decision, ruling that "the lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation" and that "where [scientific] uncertainty exists, a trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource."[155]

On appeal, the Moon Court affirmed the adoption of the precautionary principle.[156] *Waiāhole I* noted the principle's "diverse forms throughout the field of environmental law" and quoted excerpts from the "loadstar opinion" of the U.S. Court of Appeals for the District of Columbia Circuit in *Ethyl Corp. v. EPA*, including the recognition that "[q]uestions involving the environment are particularly prone to uncertainty. . . . Yet the statutes—and common sense—demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable."[157]

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provided by law." *Id.* at 142, 9 P.3d at 454.

[154] There are several variations of the precautionary principle, all of which share the "normative assumption that when a government is balancing and integrating scientific, economic, political, and social values for the purpose of risk management, environmental protection is to be a paramount value." Phillip M. Kannan, *The Precautionary Principle: More Than a Cameo Appearance in United States Environmental Law?*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 409, 418 (2007). *See also* Michael Pollan, *The Year in Ideas, A to Z: Precautionary Principle*, N.Y. TIMES MAGAZINE, Dec. 9, 2001, at 92 (explaining that the precautionary principle, rooted in German environmental law, has gone international, popping up in the preamble of the U.N. Treaty of Biodiversity and appearing in a "slew of protocols and rules issued by the European Union in the 90s. It informs treaties like the 2000 Cartagena Protocol on Biosafety, which allows countries to bar genetically modified organisms on the basis of precaution."). A Westlaw search for "precautionary principle" reveals only two cases in which U.S. courts cited to the precautionary principle prior to the year 2000 when the Moon Court decided *Waiāhole I*.

[155] *Waiāhole I*, 94 Haw. at 154, 9 P.3d at 466 (quoting the Commission's decision). The first statement generally tracks the language of Principle 15 of the Rio Declaration on Environment and Development. *See* Rio Declaration on Environment and Development, princ. 15, U.N. Doc. A/Conf.151/5 (1992), *reprinted in* 31 I.L.M. 874, 879 (1992) ("Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."). In its decision, the Water Commission cited two cases from the U.S. Court of Appeals for the District of Columbia: *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976), and *Lead Industrial Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), both dealing with the U.S. EPA's statutory authority to regulate air pollution in the face of scientific uncertainty.

[156] *Waiāhole I*, 94 Haw. at 154-55, 9 P.3d at 466-67.

[157] *Id.* at 155 n.59, 9 P.3d at 467 n.59 (quoting *Ethyl Corp.*, 541 F.2d at 24-25).

The court recognized that the principle "must vary according to the situation and can only develop over time."[158] Nevertheless, it agreed with what it considered the principle's "quintessential form: at minimum, the absence of firm scientific proof should not tie the Commission's hands in adopting reasonable measures designed to further the public interest."[159]

Similar to the Commission's conception of the precautionary principle in terms of a "trustee's duty," the court viewed the principle as "simply restat[ing]" the Commission's duties under the public trust and the Code, neither of which "constrains the Commission to wait for full scientific certainty in fulfilling its duties towards the public interest in [providing for] instream flows."[160] After all, "[u]ncertainty regarding the exact level of protection necessary justifies neither the least protection feasible nor the absence of protection."[161] Based on the Commission's "duties as a trustee" and the "interest in precaution," the court held that "the Commission should consider providing reasonable 'margins of safety' for instream trust purposes when establishing instream flow standards."[162]

Waiāhole I broke legal ground on a number of levels. First, it solidified the foundation for water law in Hawai'i that Chief Justice Richardson articulated in *McBryde*, *Robinson*, and *Reppun*.[163] As detailed above, the Moon Court strongly reaffirmed that water and other public natural resources in Hawai'i are held in trust by the State for the benefit of present and future generations.

Second, the Moon Court built upon Chief Justice Richardson's legal foundation to elucidate the larger framework for water resource management in Hawai'i under the amended constitution and Water Code. This new framework demands that the Commission take a proactive role; as "the primary guardian of public rights under the trust[,]" the "Commission must not relegate itself to the role of a mere 'umpire passively calling balls and strikes for adversaries appearing before it,' but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process."[164]

Third, the court identified public trust purposes, including resource protection, Native Hawaiian traditional and customary rights, and appurtenant rights, which have priority over other types of uses.[165] The court also clarified

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[158] *Id.* at 155, 9 P.3d at 467.

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.* at 156, 9 P.3d at 468.

[163] *See supra* text accompanying notes 60-74.

[164] *Id.* at 143, 9 P.3d at 455 (quoting Save Ourselves, Inc. v. La. Envtl. Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984)).

[165] *Id.* at 130-44, 9 P.3d at 442-56.

the Water Commission's duties, the permit applicant's burden of proof, and other issues. Thus, *Waiāhole I* resolved the vast majority of questions about the state of water law in Hawai'i.

2. Waiāhole II

After the Hawai'i Supreme Court's pathbreaking decision in *Waiāhole I*, the Commission held remanded hearings and issued a decision in December 2001 amending the IIFSs for the streams diverted by the Waiāhole Ditch and issuing water use permits to several Leeward users.[166] The Commission attempted to justify the revised IIFSs by claiming that they were approximately one half of the streams' historic pre-ditch flows, and, "according to one Hawaiian historian, 'no ditch was permitted to divert more than half the flow from a stream.'"[167] The Water Commission apparently assumed that if Native Hawaiians never traditionally diverted more than half of the flow of a stream, then half of a stream's flow must be sufficient to protect instream values.[168] The Commission also claimed that its revised flows should sufficiently protect aquatic life because the IIFSs "exceed the 1960s flows, where testimony established that presence of aquatic biota at a higher level than today."[169] The Windward Parties appealed again on several grounds, including that the Commission's decision was arbitrary and misunderstood Hawaiian custom and tradition.[170] The Hawai'i Supreme Court rendered a second decision in the case in June 2004, affirming part of the Water Commission's decision, vacating

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[166] *Waiāhole II*, 105 Haw. 1, 11, 93 P.3d 643, 653 (2004). The Water Commission issued its first remanded decision on December 28, 2001 and responded to the issues posed by the Hawai'i Supreme Court by concluding:

> (1) 8.7 mgd shall be released into Waiāhole stream, 3.5 mgd shall be released into Waianu stream, and 3.5 mgd shall be released into Waikane stream; (2) IIFSs must be met before the ditch operator may allocate water to any of the leeward offstream permitted uses, and any water not used shall be released into the windward streams, of which 0.9 mgd shall be released into Waikane stream and any remainder into Waiāhole stream; (3) "2,500 gad [(gallons per acre per day)] for acres under cultivation or planned to be under cultivation is a reasonable water duty for leeward diversified agriculture" and the diversified agriculture water use permits are conditioned "on a showing of actual use, not to exceed 2,500 gad, within four years of this Decision and Order"[;] (4) Campbell Estate and PMI have no practicable alternative sources of water; and (5) "ADC should be able to function with a system-loss use permit of 2.00 mgd."

Id. at 7, 93 P.3d at 649.

[167] *Id.* at 11, 93 P.3d at 653 (citing HANDY & HANDY, *supra* note 26, at 58).

[168] *Id.* at 10-14, 93 P.3d at 652-56.

[169] *Id.* at 12, 93 P.3d at 654 (quoting the Commission's decision).

[170] *Id.* at 10-14, 93 P.3d at 652-56.

others, and remanding more issues back to the Commission for further hearings.[171]

On this second appeal, the Moon Court rejected the "half approach" as "erroneous" because it was based on an assumption that was "arbitrary and speculative," and because the proposed IIFSs did not ensure the protection of instream resources, which is a fundamental purpose of an IIFS.[172] In doing so, the court rejected the deference normally given to an administrative agency; such a rejection occurs where that agency fails to base its decision on "reasonably clear" findings of fact and conclusions of law based on the evidence.[173] The court was particularly insistent on clarity "where the agency performs as a public trustee and is duty bound to demonstrate that it has properly exercised the discretion vested in it by the constitution and the statute."[174]

Moreover, because the Water Commission also failed to make specific findings regarding each stream's flow during the 1960s, the court ruled that the Water Commission's remanded decision was unsupported by the evidence.[175] Instead of concluding that the Commission had committed clear error, the *Waiāhole II* court remanded the case a second time and directed the Commission to make specific findings quantifying stream flows in the 1960s, which were necessary to support its rationale.[176] The court clarified that it would closely examine the Commission's findings for flow standards that result in "stream habitat improvement" and the satisfaction of "appurtenant rights, riparian uses, and existing uses."[177] Such findings must "adequately establish that instream values would be protected to the extent practicable for interim purposes."[178]

Despite strong language in *Waiāhole I* encouraging prompt action on instream flow standards (IFSs), the Commission failed to establish any permanent IFSs in the intervening four-year period between the two *Waiāhole* appeals.[179] Troubled by this inaction on permanent IFSs, the *Waiāhole II* court admonished the Commission:

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[171] *Id.* at 27, 93 P.3d at 669.

[172] *Id.* at 11, 93 P.3d at 653.

[173] *Id.* (citing *In re* Wai'ola O Moloka'i, Inc. (*Wai'ola*), 103 Haw. 401, 432, 83 P.3d 664, 695 (2004)).

[174] *Id.* (citing Save Ourselves, Inc. v. La. Envtl. Control Comm'n, 452 So. 2d 1152, 1159-60 (La. 1984)).

[175] *Id.* at 12, 93 P.3d at 654.

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

> We take this opportunity, however, to remind the Water Commission that seventeen years have passed since the Water Code was enacted requiring the Water Commission to set permanent instream flow standards by investigating the streams. In addition, four years have passed since this court held that "the Commission shall, with utmost haste and purpose, work towards establishing permanent instream flow standards for windward streams." The fact that an IIFS is before this court evinces that this mandate has not yet been completed as of the Water Commission's D&O II.[180]

On this second appeal, appellants also challenged a 2.2 mgd "buffer" flow that the Commission had not specifically allocated as part of any IIFS.[181] The court concluded that the Commission had failed to make any findings regarding the buffer, leaving the court without a means to decide the issue.[182] Accordingly, the court once again remanded this issue for appropriate findings and conclusions to allow for any review on appeal.[183] Despite being reversed numerous times, the Water Commission resisted the Moon Court's guidance, which extended the case for almost two decades.

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[180] *Id.* (internal citations omitted).

[181] *Id.* at 13, 93 P.3d at 655.

[182] *Id.*

[183] After *Waiāhole II*, the Commission's 2006 decision on remand again divided the water between Windward streams and Leeward users. About 12 mgd was split between Waiāhole, Waianu and Waikāne streams; another 12.6 mgd was permitted for offstream use in Leeward O'ahu; roughly 2.4 mgd was temporarily restored to the streams, subject again to the condition that the restored water could be taken later for other uses. Comm'n on Water Res. Mgmt., Findings of Fact, Conclusions of Law, and Decision and Order in the Second Remand Proceedings of *In Re* Water Use Permit Applications 72-73 (July 13, 2006), *available at* http://hawaii.gov/dlnr/cwrm/currentissues/cchoa9501/CCHOA95-3F.pdf. For the first time in the Commission's history, the 2006 decision also included a vigorous dissent, which argued that more water should have been restored to the streams and that the permit issued to a defunct golf course was wrong. Comm'n on Water Res. Mgmt., Opinion Dissenting in Part and Concurring in Part, By Commissioner Peter T. Young and Joined by Commissioner Chiyome L. Fukino in the Second Remand Proceedings of *In Re* Water Use Permit Applications 1-7 (July 13, 2006), *available at* http://hawaii.gov/dlnr/cwrm/currentissues/cchoa9501/CCHOA95-3F.pdf. In 2004, the Legislature amended the law abolishing direct appeals from the Water Commission and a host of other agencies. HAW. REV. STAT. § 91-14 (Supp. 2010) (the amended law took effect on July 1, 2006). Since that amendment, appeals under the Water Code now go to the Hawai'i Intermediate Court of Appeals instead of the Hawai'i Supreme Court. *Id.* In October 2010, the Intermediate Court of Appeals issued an unpublished memorandum opinion in the appeal of the 2006 decision. *In re* Water Use Permit Applications, No. 28108, 2010 WL 4113179 (Haw. App. Oct. 13, 2010). The court agreed (and thus reversed the Commission's determination) that a permit for the defunct Pu'u Makakilo golf course violated the Water Code, but upheld the Commission's decision to issue a permit to Campbell Estate and not restore more water to the Windward streams. *Id.* at *1. As an unpublished memorandum opinion, however, the 2010 decision had no bearing on the Moon Court's decisions.

Following *Waiāhole I* and *II*, two cases originating on Moloka'i helped to shed light on several outstanding issues, including the identification of Department of Hawaiian Home Lands reservations as protected public trust purposes, the scope of the Commission's public trust obligation to protect Native Hawaiian traditional and customary rights, and the burdens imposed on applicants who seek to use public trust resources for their private commercial gain.[184]

C. In re Wai'ola O Moloka'i, Inc.

In re Wai'ola O Moloka'i, Inc. (*Wai'ola*) presented the first opportunity for the Moon Court to focus on and address the scope of the public trust in Hawai'i's ground water resources.[185] Because *Waiāhole I* resolved much of the existing framework for water resource management, *Wai'ola* concentrated largely on the allocation of ground water, including how the public trust balanced competing needs, especially between public trust purposes and private commercial uses.[186]

As with other Hawaiian islands, Moloka'i's ground and surface water resources are intimately linked.[187] Ground water pumpage and use in one area has the potential to impact the quality of wells and the discharge of fresh water into nearshore marine areas, the latter of which is necessary to protect and restore traditional and customary Native Hawaiian practices, including the gathering of fish, limu (seaweed), and other marine life.[188] Due in part to these connections, including the practical reality that Moloka'i's ground water supplies constitute one unified water body, the entire island was designated a GWMA[189] in 1992.[190] For administrative purposes, the Water Commission

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[184] *See generally In re* Kukui (Moloka'i), Inc. (*Kukui*), 116 Haw. 481, 174 P.3d 320 (2007); *In re* Wai'ola O Moloka'i, Inc. (*Wai'ola*), 103 Haw. 401, 83 P.3d 664 (2004).

[185] 103 Haw. 401, 83 P.3d 664. Although *Waiāhole I* focused largely on IIFSs for the streams diverted by the Waiāhole Ditch System, the case involved some ground water regulation because the majority of the water delivered by the ditch is ground water from a designated WMA that would otherwise feed the Windward streams. *See Waiāhole I*, 94 Haw. 97, 111, 9 P.3d 409, 423 (2000).

[186] *See generally Wai'ola*, 103 Haw. 401, 83 P.3d 664.

[187] *See* DELWYN S. OKI, NUMERICAL SIMULATION OF THE HYDROLOGIC EFFECTS OF REDISTRIBUTED AND ADDITIONAL GROUND-WATER WITHDRAWAL, ISLAND OF MOLOKA'I, HAWAI'I: SCIENTIFIC INVESTIGATIONS REPORT 2006-5177 (2006) [hereinafter OKI, HYDROLOGIC EFFECTS STUDY] (detailing the interconnection between Moloka'i's ground and surface water resources); DELWYN S. OKI, EFFECTS OF GROUND-WATER WITHDRAWAL ON KAUNAKAKAI STREAM ENVIRONMENTAL RESTORATION PLAN, MOLOKA'I, HAWAI'I (2007) (noting the same).

[188] *Wai'ola*, 103 Haw. at 410-15, 83 P.3d at 673-78.

[189] *See supra* note 91 and accompanying text (providing more background on GWMA designation).

[190] *Wai'ola*, 103 Haw. at 413, 83 P.3d at 676.

delineated four hydrologic units,[191] which were subdivided into sixteen separate aquifer[192] (ground water)[193] systems.[194]

When the appeal was filed in 1999, Moloka'i Ranch owned "approximately one third of the land on Moloka'i (approximately fifty thousand acres)."[195] Wai'ola was a wholly owned subsidiary of the Moloka'i Ranch and its water purveyor.[196] By 1998, Wai'ola supplied water "to approximately one sixth of the population of Moloka'i, primarily consisting of residences and commercial businesses in" West Moloka'i, including Kualapu'u.[197] Moloka'i Ranch "created a thirty-year development plan to revitalize the Moloka'i economy[,]" including various development projects, some of which sought to maintain and capitalize on the island's "rural character and open space."[198] Moloka'i's West end in particular possesses critically limited ground water resources, and private

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[191] The Hawai'i State Water Code defines "hydrologic unit" as a "surface drainage area or a ground water basin or a combination of the two." HAW. REV. STAT. § 174C-3 (1993). The United States is divided and sub-divided into successively smaller hydrologic units. U.S. Geological Survey, *What are Hydrologic Units?*, http://water.usgs.gov/GIS/huc.html (last visited Feb. 25, 2011). Hydrologic units are classified into four levels: regions (largest), sub-regions, accounting units, and cataloging units (smallest). *Id.* The Hawaiian Islands comprise Region 20. *Id.* Hawai'i's Water Commission established ground water hydrologic units to "provide a consistent basis for managing ground water resources. The units [were] primarily determined by subsurface conditions. In general, each island [was] divided into regions that reflect broad hydrogeological similarities while maintaining hydrographic, topographic, and historical boundaries where possible. Smaller sub-regions [were] then delineated based on hydraulic continuity and related characteristics. In general, these units allow for optimized spreading of island wide pumpage on an aquifer-system-area scale." Comm'n on Water Res. Mgmt., *Ground Water Hydrologic Units*, http://www.state.hi.us/dlnr/cwrm/gw_hydrounits.htm (last visited Mar. 26, 2011).

[192] An "aquifer" means a "geological formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well, tunnel or spring." HAW. CODE R. § 11-23-03 (1996).

[193] The Code defines "ground water" as "any water found beneath the surface of the earth, whether in perched supply, dike-confined, flowing, or percolating in underground channels or streams, under artesian pressure or not, or otherwise." HAW. REV. STAT. § 174C-3 (1993).

[194] *Wai'ola*, 103 Haw. at 411, 83 P.3d at 674 ("Moloka'i is composed of four hydrologic units: the West, Central, Northeast, and Southeast sectors. The four hydrologic units have been subdivided into sixteen aquifer systems. The Kualapu'u aquifer system is located in the Central sector, and the Kamiloloa aquifer system (Wai'ola's proposed well site) is located in the Southeast sector, adjacent to and east of the Kualapu'u aquifer system."). For more information on Moloka'i's hydrology, see also WILSON OKAMOTO CORP., COMM'N ON WATER RES. MGMT., HAWAII WATER PLAN: WATER RESOURCE PROTECTION PLAN (2008), *available at* http://www.state.hi.us/dlnr/cwrm/planning/wrpp2008update/FINAL_WRPP_20080828.pdf.

[195] *Wai'ola*, 103 Haw. at 410, 83 P.3d at 673.

[196] *Id.*

[197] *Id.*

[198] *Id.*

development interests often compete with Native Hawaiians attempting to enforce their rights.[199]

This case centered on Wai'ola's request to construct a well, install a pump, and obtain a water use permit for an additional 1.25 mgd from the Kamiloloa aquifer for current and future domestic, commercial, industrial, and municipal water needs.[200] Wai'ola's "proposed well site is approximately three miles from the existing Kualapu'u well field, from which" Maui County, Hawai'i's Department of Hawaiian Home Lands (DHHL), and Kukui Moloka'i Inc. (KMI)[201] currently pump drinking water.[202] Appellants, including DHHL, the Office of Hawaiian Affairs (OHA), and individual Native Hawaiian practitioners represented by the Native Hawaiian Legal Corporation and Earthjustice,[203] raised concerns about the potential impacts of Wai'ola's use on the adjacent Kualapu'u aquifer.[204] Although the court upheld the administrative division of the aquifers, it nevertheless addressed the interconnectivity of these ground water sources to ensure that the water rights of other users were not affected by Wai'ola's actions.[205] The case provided a unique opportunity to further define the rights of water users in GWMAs, while also clarifying various Water Code provisions affecting Native Hawaiians.[206]

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[199] *Id.* at 411, 83 P.3d at 674. In 2008, Moloka'i Ranch (also known as Moloka'i Properties Limited), the island's largest private landowner and employer, moved forward with a plan to develop Lā'au Point, an area of tremendous cultural significance to Native Hawaiians. MOLOKA'I PROPERTIES LIMITED, LĀ'AU POINT DRAFT ENVIRONMENTAL IMPACT STATEMENT (2008), *available at* http://gen.doh.hawaii.gov/Shared%20Documents/EA_and_EIS_Online_Library/Molokai/2000s/2008-01-08-DEIS-Laau-Point-Vol-1-JAN-2008-withdrawn.pdf [hereinafter LĀ'AU POINT DEIS]. Moloka'i Ranch offered to put 50,000 acres into a land trust, preserving the majority of the Ranch's land-holdings from future development in exchange for community support to develop 200 luxury homes at Lā'au Point. *Id.* When faced with strident community opposition, the Ranch closed its doors, laying off about 120 employees on Moloka'i. *See* Chris Hamilton, *Molokai Ranch Gone, But Not La'au Point Plans*, HONOLULU ADVERTISER, Apr. 6, 2008, *available at* http://the.honoluluadvertiser.com/article/2008/Apr/06/br/hawaii80406015.html.

[200] *Wai'ola*, 103 Haw. at 411, 83 P.3d at 674.

[201] KMI was a company owned entirely by Moloka'i Properties Limited, Moloka'i's largest private landowner. *See generally* LĀ'AU POINT DEIS, *supra* note 199, at 20. KMI owned and operated the Kaluako'i Resort in addition to Well 17, a productive ground water source in the Kualapu'u aquifer. *Wai'ola*, 103 Haw. at 410, 83 P.3d at 673. KMI was involved in this case because it sold water from Well 17 to Wai'ola. *Id.*

[202] *Wai'ola*, 103 Haw. at 411, 83 P.3d at 674.

[203] *Id.* at 407, 83 P.3d at 670.

[204] *Id.* at 411-13, 83 P.3d at 674-76.

[205] *See, e.g.*, *id.* at 424, 83 P.3d at 687. Because each aquifer is hydrologically connected, pumping and other water use in one aquifer can affect the water levels in the adjacent aquifers. *Id.* at 423-24, 83 P.3d at 686-87.

[206] *Id.* at 439-43, 83 P.3d at 702-06.

1. DHHL water reservations are public trust purposes

One of the essential issues the Moon Court resolved in *Wai'ola* was whether DHHL reservations have priority as a public trust purpose. DHHL was established in 1920 to help provide homestead opportunities for Hawaiians with greater than fifty percent blood quantum.[207] Under both the Hawaiian Homes Commission Act[208] and Hawai'i's State Water Code,[209] DHHL is entitled to reserve water for its use.[210] DHHL has over 25,000 acres on Moloka'i alone and reserved 2.905 mgd from the Kualapu'u aquifer for homesteading opportunities on those lands.[211] DHHL raised concerns about the impacts of Wai'ola's proposed new well on its water reservation and, in 1996, filed a water use permit application for an "additional 0.9 mgd of groundwater from its two existing wells in the Kualapu'u aquifer system for domestic and agricultural uses in Ho'olehua and Kalama'ula."[212]

The Commission, however, ruled that DHHL's reservations were aquifer-specific and did not constitute "existing legal uses" under the Code.[213] The Commission concluded that because DHHL's reservation was for the

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[207] DHHL was established through the enactment of the Hawaiian Homes Commission Act, ch. 42, 42 Stat. 108 (1921), *reprinted in* 1 HAW. REV. STAT. 261 (2009). The Hawaiian Homes Commission Act (HHCA) provides for the "rehabilitation of the native Hawaiian people through a government-sponsored homesteading program" intended to "provide for economic self-sufficiency of native Hawaiians through the provision of land." Dep't of Hawaiian Homelands, *Laws/Rules*, http://hawaii.gov/dhhl/laws (last visited Feb. 25, 2011). "Native Hawaiians" are defined by the HHCA as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Hawaiian Homes Commission Act § 201(a). Homestead leases are for residential, agricultural, or pastoral purposes. Dep't of Hawaiian Homelands, *Laws/Rules*, *supra*. For more background on DHHL and its programs, visit http://hawaii.gov/dhhl.

[208] *See, e.g.*, Hawaiian Homes Commission Act § 221(c) ("In order adequately to supply livestock, the aquaculture operations, the agriculture operations, or the domestic needs of individuals upon any tract, the department is authorized (1) to use, free of all charge, government-owned water not covered by any water license or covered by a water license issued after the passage of this Act or covered by a water license issued previous to the passage of this Act but containing a reservation of such water for the benefit of the public[.]").

[209] HAW. REV. STAT. § 174C-101(a) (1993) (The Water Commission "shall, to the extent applicable and consistent with other legal requirements and authority, incorporate and protect adequate reserves of water for current and foreseeable development and use of Hawaiian home lands as set forth in section 221 of the Hawaiian Homes Commission Act."); HAW. CODE R. § 13-171-63 (1996) (expressly reserving 2.905 mgd for DHHL from the Kualapu'u aquifer).

[210] *Wai'ola*, 103 Haw. at 412, 83 P.3d at 675; *see also* HAW. REV. STAT. § 174C-101(a) (1993).

[211] *Wai'ola*, 103 Haw. at 412, 83 P.3d at 675.

[212] *Id.*

[213] *Id.* at 427, 83 P.3d at 690.

Kualapu'u aquifer and Wai'ola was requesting water from the Kamiloloa aquifer, issuing the permit would not affect DHHL's reservation.[214]

The Hawai'i Supreme Court accepted the Commission's reasoning regarding both aquifer specificity and the fact that reservations of water are not "existing legal uses."[215] The court would not, however, allow the Commission to use those classifications to "divest DHHL of its right to protect its reservation interests from interfering water uses in adjacent aquifers."[216] Moreover, even though DHHL's reservation of water was not deemed an existing legal use, the reservation was nonetheless protected by the Code and is, in fact, "a public trust purpose, which the commission has a duty to protect in balancing the competing interests for a water use permit application."[217]

The court based its conclusion on Hawai'i common law, the Hawai'i Constitution, the Hawaiian Homes Commission Act, and the Water Code,[218] ruling that "DHHL's reservations of water throughout the State are entitled to the full panoply of constitutional protections afforded the other public trust purposes."[219] The court recognized, however, that this protection does not "preclude the controlled development of water resources for private commercial use."[220] Rather, there must be a balance between public and private purposes, and planning and allocation of water "must account for the public trust and protect public trust uses to the extent feasible."[221] Because the record did not include "a single [finding of fact] regarding whether [Wai'ola] established that the proposed use would interfere with DHHL's reservation in the Kualapu'u aquifer . . . [,]" the court determined that the Commission had violated its public trust duty, vacated Wai'ola's permit, and remanded for further

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[214] *Id.*

[215] *Id.*; *see also* HAW. REV. STAT. § 174C-50 (1993 & Supp. 2010) (outlining permitting provisions for any "existing uses"; or those uses in effect on the date of a water management area's designation). Although the Commission failed to address DHHL's water reservations in the Kualapu'u aquifer, the court ruled that the Commission properly addressed DHHL's existing legal uses in the Kualapu'u aquifer, namely DHHL's existing wells. *Wai'ola*, 103 Haw. at 432, 83 P.3d at 695. The court based this finding on three considerations: two hydrological studies that the Commission relied on to determine that impact to existing uses would be minimal; the fact that the Commission permitted only half of the amount Wai'ola requested; and the Commission's proposed municipal reservation. *Id.* at 432-33, 83 P.3d at 695-96. By considering these factors in light of DHHL's existing wells, the court ruled that the Commission acted "with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." *Id.* at 433, 83 P.3d at 696 (quoting *Waiāhole I*, 94 Haw. 97, 143, 9 P.3d 409, 455 (2000)).

[216] *Wai'ola*, 103 Haw. at 424, 83 P.3d at 687.

[217] *Id.* at 427, 83 P.3d at 690.

[218] *Id.* at 428, 83 P.3d at 691.

[219] *Id.* at 431, 83 P.3d at 694.

[220] *Id.* (citing *Waiāhole I*, 94 Haw. at 141, 9 P.3d at 453).

[221] *Id.* (citing *Waiāhole I*, 94 Haw. at 142, 9 P.3d at 454).

proceedings.[222] On remand, the court required the applicant to demonstrate that the proposed use will not interfere with the rights of DHHL before the Commission may issue a water use permit.[223]

2. Respecting Native Hawaiian traditional and customary rights

In *Wai'ola*, the Moon Court strongly reaffirmed Native Hawaiian traditional and customary rights, including gathering rights.[224] The decision noted that "a substantial population of native Hawaiians on Moloka'i engage[] in subsistence living[,]" which includes gathering limu and fishing in nearshore areas, where the input of freshwater is a necessity.[225] The Commission found "no evidence was presented" that the drilling of Wai'ola's well would affect the exercise of Native Hawaiian traditional and customary rights, and concluded that such rights would not be abridged by Wai'ola's proposed pumping.[226]

The Moon Court, however, disagreed and ruled that "the absence of evidence . . . [is] insufficient to meet the burden imposed on Wai'ola by the public trust doctrine."[227] In addition, the hearings officer erred by failing to allow attorneys for the Native Hawaiian cultural practitioners to cross-examine a witness relating to conflicting data.[228] Thus, the court held that the Commission failed to uphold its public trust duty in not requiring Wai'ola to meet its burden of establishing that its proposed use would not abridge or deny Native Hawaiian traditional and customary rights and practices.[229] After all, the Hawai'i Supreme Court "ha[s] consistently recognized the heightened duty of care owed to the native Hawaiians."[230]

D. In re Kukui (Moloka'i), Inc.

Similar to the Moon Court's ruling in *Wai'ola*, *In re Kukui (Moloka'i), Inc.* (*Kukui*) involved multiple appeals of the Water Commission's 2001 decision

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[222] *Id.* at 432, 83 P.3d at 695.

[223] *Id.* at 439, 83 P.3d at 702. Beyond the issue of interference with DHHL's water rights, the court ruled that the applicant had met all other criteria required by the Code pursuant to issuance of a water use permit. *Id.* As of the date of this article's publication, the remanded hearings have yet to occur. E-mail from Bill Tam, Deputy Dir., Comm'n on Water Res. Mgmt., to author (Apr. 9, 2011, 20:06 HST) (on file with author).

[224] *See Wai'ola*, 103 Haw. at 441, 83 P.3d at 704.

[225] *Id.* at 439, 83 P.3d at 702.

[226] *Id.* at 442, 83 P.3d at 705.

[227] *Id.*

[228] *Id.* at 443, 83 P.3d at 706.

[229] *Id.*

[230] *Id.* at 430, 83 P.3d at 693.

issuing water use permits to Kukui (Moloka'i), Inc. (KMI)[231] for approximately 1 mgd for existing and proposed new uses from Well 17 in the Kualapu'u aquifer.[232] Although the location of the well in *Kukui* differed from the location of the well in *Wai'ola* (which was in the neighboring Kamiloloa aquifer), the two cases draw close parallels because they both involved the impacts of ground water withdrawals on the Kualapu'u aquifer, its interconnected coastal waters, and DHHL's water reservations in Kualapu'u.[233] *Kukui* thus involved many of the same issues and parties as *Wai'ola*, including appellants DHHL, OHA, and Native Hawaiian practitioner Judy L. Caparida.[234] DHHL voiced concerns about the impacts of KMI's uses on DHHL's existing wells and reservations of water, including the Commission's failure to adequately consider impacts on these public trust purposes.[235] OHA pointed out numerous problems, including violations of the public trust.[236] Native Hawaiian practitioners Caparida and Georgina Kuahuia took issue with the effects of KMI's use on ground water discharges into the nearshore marine area, which negatively impacts traditional and customary Native Hawaiian rights and practices.[237]

In 2007, the Moon Court vacated the Commission's final decision and order granting KMI's water use permits, and remanded for further proceedings.[238] The Commission's mandate to protect the public's interest in Hawai'i's water resources figured prominently in the court's decision.[239] The court ultimately vacated KMI's permits by ruling that "the Commission's decision lacked the requisite degree of scrutiny."[240] In reaching that holding, the court rejected DHHL's arguments concerning sustainable yield,[241] existing water uses,[242] and

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[231] *See supra* note 201 (explaining KMI's interest). As is relevant to *Kukui*, KMI owned the land overlying Well 17, the well at issue in this case. *In re* Kukui (Moloka'i), Inc. (*Kukui*), 116 Haw. 481, 486, 174 P.3d 320, 325 (2007). While the appeal was pending, Kaluakoi Land, LLC acquired KMI's assets. *Id.* at 488, 174 P.3d at 327.

[232] *Id.* at 488-89, 174 P.3d at 327-28.

[233] *See id.* at 491, 493, 174 P.3d at 330, 332.

[234] *See id.*

[235] *Id.* at 485, 174 P.3d at 324.

[236] *Id.* at 485-86, 174 P.3d at 324-25.

[237] *Id.* at 486, 174 P.3d at 325.

[238] *Id.* As of the date of this article's publication, the remanded hearings have yet to occur. E-mail from Bill Tam to author, *supra* note 223.

[239] *Kukui*, 116 Haw. at 490, 174 P.3d at 329-30.

[240] *Id.* at 492, 174 P.3d at 331.

[241] Sustainable yield is the maximum amount of water that may be pumped from a ground water aquifer while still maintaining the integrity of that source. *See* HAW. REV. STAT. § 174C-3 (1993). Specifically, DHHL argued that the Commission erred when it "relied on the 5.0 mgd sustainable yield determination in spite of evidence that the Kualapu'u Aquifer may be overdrawn and that the sustainable yield may actually be as low as 3.2 mgd." *Kukui*, 116 Haw. at 492, 174 P.3d at 331. The court disagreed and ruled that even if 5.0 mgd was too high, the

Safe Drinking Water Act violations,[243] but agreed with DHHL regarding KMI's failure to satisfy its burden of demonstrating the absence of practicable alternatives to the water source at issue.[244]

Commission could, in this case, rely on the sustainable yield that was adopted prior to KMI's application. *Id.* at 499-500, 174 P.3d at 338-39. Despite established flaws in the methodology used to establish the sustainable yields for many aquifers statewide, including Kualapu'u, the court ruled that "it would be inappropriate for the Commission to reevaluate the sustainable yield figure in a permit application proceeding." *Id.* at 493, 174 P.3d at 332. *See also* SPROAT, *supra* note 27, at 37-38 ("The initial Sustainable Yields adopted by the Water Commission . . . largely used the RAM or Robust Analytical Model, a two dimensional model developed by John Mink. Scientific models have since demonstrated that the RAM incorporated certain principles, such as the ideal placement of wells, which are not required or provided for by the Water Code. Therefore, many of the Commission's initial Sustainable Yields overestimated the amount of water that could be safely withdrawn without impairing the integrity of the water source. Later studies by United States Geological Survey and others have assisted the Water Commission in calculating more accurate Sustainable Yields and the Commission is in the process of updating those figures. In the absence of more detailed data and modeling, however, RAM continues to provide the only information available.").

[242] DHHL argued that the Commission's permit approval for existing and new uses, including KMI's, could not be reconciled with the Commission's earlier refusal to grant DHHL's water use permit applications. *Kukui*, 116 Haw. at 493, 174 P.3d at 332. DHHL's request to exercise its reservation and increase its withdrawals from 0.367 mgd to 1.247 mgd had been denied based on "very real concerns" over "sustaining the 'potable quality' of the wells located in the Kualapu'u Aquifer." *Id.* Chloride levels, or the salt content of pumped ground water, are often an indicator of an aquifer's health and whether it can continue to produce drinkable or "potable" water. *See id.* at 494, 174 P.3d at 333. *See also* U.S. Geological Survey, *Recent Hydrologic Conditions, Chloride Concentration of Pumped Water, Iao and Waihee Aquifer Areas, Maui, Hawaii: Chloride Concentration of Pumped Water*, http://hi.water.usgs.gov/recent/iao/chloride.html (last visited Feb. 25, 2011) (providing information on the relationship between chloride concentrations and ground water pumping). The court agreed with DHHL in part, distinguished between KMI's application for existing versus new uses, and remanded the issue. *Kukui*, 116 Haw. at 494-95, 174 P.3d at 333-34. The court reasoned that the Commission was concerned "with the effect of increased pumpage on the chloride content in the well field[,]" and that "KMI's application to continue an existing use did not threaten to increase pumpage[.]" *Id.* at 494, 174 P.3d at 333 (emphasis omitted). The court also recognized the Code's "preference for existing uses." *Id.* Because KMI's application to withdraw 82,000 gallons per day for new uses might, however, result in the same "potable quality" concerns as DHHL's application, the court remanded that issue for further clarification. *Id.* at 494-95, 174 P.3d at 333-34.

[243] DHHL argued that KMI violated the Safe Drinking Water Act (SDWA), codified as Hawai'i Revised Statutes chapter 420E. *Kukui*, 116 Haw. at 496-97, 174 P.3d at 335-36. The record indicated that the "Department of Health filed a 'Notice and Finding of Violation' against KMI . . . [finding] that 'KMI had been using the Kaluakoi water system to supply water to the public, after June 29, 1993, without filtration that meets the criteria of HAR section 11-20-46(c) of the Surface Water Treatment Rule (SWTR) Administrative Manual, as required by HAR section 11-20-46(a)(4).'" *Id.* Nevertheless, the court ruled that neither the Water Code nor the public trust preclude the Commission from granting KMI's water use permit due to a SDWA violation. *Id.* at 497, 174 P.3d at 336.

Ultimately, the Moon Court vacated KMI's permits based on the Commission's failure to enter findings of fact or conclusions of law "as to the existence or feasibility of any alternative sources of water whatsoever. The Commission . . . failed to hold KMI to its burden of demonstrating the absence of feasible alternative sources of water."[245] As evidenced by special condition #5 on KMI's permits, the Commission "appear[ed] to have reserved consideration . . . until after the permit ha[d] been granted[,]" which was "fundamentally at odds with the Commission's public trust duties."[246]

1. DHHL reservations have priority as a public trust purpose

Relying on precedent from *Wai'ola*, which was decided while the Commission's final decision and order in *Kukui* was on appeal,[247] the Moon Court concluded that DHHL's reservation was a "public trust 'purpose' and not an 'existing legal use.'"[248] The court ruled that *Wai'ola* "conclusively resolved" this issue based on the plain language of Hawai'i Revised Statutes section 174C-49(d) and Hawai'i Administrative Rules section 13-171-63.[249] Although DHHL's reservation was not an "existing use," as a "public trust purpose" it was "entitled to the full panoply of constitutional protections afforded the other public trust purposes . . . in *Waiāhole I*."[250]

The Moon Court recognized that DHHL's status as a public trust purpose renders DHHL's reservation "superior to the prevailing private interests in the resources at any given time."[251] The court acknowledged, however, that the Commission may still approve private uses that might "compromise DHHL's reservation," so long as that decision is made with "openness, diligence, and foresight."[252]

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[244] *Id.* at 495-96, 174 P.3d at 334-35.

[245] *Id.* at 496, 174 P.3d at 335.

[246] *Id.*

[247] *Id.* at 491, 174 P.3d at 330.

[248] *Id.* at 486, 174 P.3d at 325.

[249] *Id.* at 491, 174 P.3d at 330.

[250] *Id.* (quoting *In re* Wai'ola O Moloka'i, Inc. (*Wai'ola*), 103 Haw. 401, 430, 83 P.3d 664, 693 (2004)). Again, other public trust purposes include: (1) water resource protection; (2) domestic water uses (which are distinct from municipal water uses); and (3) the exercise of Native Hawaiian and traditional and customary rights. *Id.* at 492 n.6, 174 P.3d at 331 n.6; *see supra* notes 143 (defining "traditional and customary Native Hawaiian rights"), 145 (defining "domestic water uses").

[251] *Kukui*, 116 Haw. at 491, 174 P.3d at 330 (quoting *Wai'ola*, 103 Haw. at 429, 83 P.3d at 692).

[252] *Id.*

2. Applicants bear the burden of proving no harm to public trust resources

The court also held that the Commission improperly "placed the burden of proof on DHHL to demonstrate that pumpage at KMI's well would increase the chloride concentration at the DHHL well site."[253] The Commission's Conclusion of Law (COL) #51 rejected DHHL's allegation of harm after concluding that DHHL failed to present "conclusive evidence" that KMI's proposed pumping of Well 17 would increase the chloride levels in DHHL's wells.[254] The court agreed with DHHL that COL #51 was a "cause for concern" because it suggested that KMI was not required to "justify its existing and proposed uses."[255] The court observed, however, that when "inconclusive allegations raise a specter of harm[,] . . . the public trust doctrine does not handcuff the Commission."[256] It is the applicant's burden to demonstrate that its use satisfies all of the requirements of the law, including "that there is, in fact, no harm, or that any potential harm does not rise to a level that would preclude a finding that the requested use is nevertheless reasonable-beneficial."[257]

3. Applicants bear the burden of proving no harm to Native Hawaiian rights and practices

Many Native Hawaiians on Moloka'i rely on natural resources from the land and sea to put food on their tables and otherwise subsist in a traditional manner.[258] "The gathering of crab, fish, limu, and octopus are traditional and customary practices that have persisted on Moloka'i for generations."[259] Traditional and customary Native Hawaiian rights are protected by various constitutional and statutory provisions, including article XII, section 7 of the Hawai'i Constitution, Hawai'i Revised Statutes sections 174C-2 and -101,[260] and other case law.[261] In *Waiāhole I*, the Moon Court upheld "'the exercise of Native Hawaiian and traditional and customary rights as a public trust purpose.'"[262] Private commercial use of water resources, on the other hand, is

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[253] *Id.* at 497, 174 P.3d at 336.

[254] *Id.* at 499, 174 P.3d at 338.

[255] *Id.* at 498, 174 P.3d at 337.

[256] *Id.* at 499, 174 P.3d at 338.

[257] *See id.*

[258] *Id.* at 508, 174 P.3d at 347.

[259] *Id.*

[260] *See, e.g.*, HAW. CONST. art. XII, § 7; HAW. REV. STAT. §§ 1-1 (2009), 7-1 (2009), 174C-2 (1993), 174C-101 (1993).

[261] *See supra* note 143.

[262] *Kukui*, 116 Haw. at 508, 174 P.3d at 347 (quoting *Waiāhole I*, 94 Haw. 97, 137, 9 P.3d 409, 449 (2000)).

not a protected public trust purpose, despite the fact that "economic development may produce important public benefits."[263]

Appellants Caparida and Kuahuia argued that increases in the amount of water pumped from Well 17 would reduce the amount of fresh water discharged into the nearshore marine environment.[264] This, in turn, would negatively impact the resources in that area, such as fish and limu (seaweed), which rely on fresh water to survive.[265] Appellants contended that "a reduction of marine life, if severe enough, [would] diminish their ability to practice their traditional and customary native Hawaiian gathering rights even if access [was] not impaired by KMI's proposed use."[266] In response, the Commission "merely observed that the 'potential adverse impacts of the current level of ground water pumpage . . . should already be visible,'" and that the "'evidence does not show that nearshore resources are in decline.'"[267] Further, the Commission's COL #40 concluded that "no evidence was presented that the use of water from Well 17 would adversely affect the exercise of traditional and customary native Hawaiian rights . . . or [that] proposed uses would adversely affect any access to the shoreline or the nearshore areas."[268]

Caparida and Kuahuia asserted, and the Moon Court agreed, that the "Commission impermissibly shifted the burden of proving harm to those claiming a right to exercise a traditional and customary native Hawaiian practice."[269] The statement that "no evidence was presented" to the Commission "erroneously shifted the burden of proof to Caparida and Kuahuia."[270] Recalling its decision in *Wai'ola*, which involved the same issue regarding the surface and ground water interrelationship on Moloka'i, the court emphasized that "'an applicant for a water use permit bears the burden of establishing that the proposed use will not interfere with any public trust purposes . . . [and] the Commission is duty bound to hold an applicant to its burden during a contested-case hearing.'"[271] Under *Wai'ola*, an applicant is obligated "'to demonstrate affirmatively that the proposed well would not affect

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[263] *Id.*

[264] *Id.* After the case was appealed, the U.S. Geological Survey issued several reports establishing that pumping the well at issue would reduce the discharge of fresh water into the nearshore marine area, thus validating appellants' concerns. *See, e.g.*, OKI, HYDROLOGIC EFFECTS STUDY, *supra* note 187, at 25.

[265] *Kukui*, 116 Haw. at 508, 174 P.3d at 347.

[266] *Id.*

[267] *Id.* at 508-09, 174 P.3d at 349-50.

[268] *Id.* at 509, 174 P.3d at 348. *But see* OKI, HYDROLOGIC EFFECTS STUDY, *supra* note 187, at 25.

[269] *Kukui*, 116 Haw. at 486, 174 P.3d at 325.

[270] *Id.* at 509, 174 P.3d at 348.

[271] *Id.* (quoting *In re* Wai'ola O Moloka'i, Inc. (*Wai'ola*), 103 Haw. 401, 441, 83 P.3d 664, 704 (2004)).

native Hawaiian[s'] rights; in other words, *the absence of evidence* that the proposed use would affect native Hawaiian[s'] rights *was insufficient to meet the burden.*'"[272] KMI submitted expert testimony and asserted that it satisfied its burden of proof.[273] The court, however, determined that the Commission's findings of fact were "insufficiently clear" to support the conclusions of law.[274]

Because earlier cases had largely resolved Hawai'i's framework for water resource management, *Kukui* essentially enforced and clarified that foundation. In particular, *Kukui* helped to elucidate the burdens imposed on private commercial users, especially in the area of native rights. *Kukui*, together with *Ko'olau Ag*, *Waiāhole I* and *II*, and *Wai'ola*, shaped the Moon Court's water law legacy.

III. THE MOON COURT'S WATER LAW LEGACY

Through *Ko'olau Ag*, *Waiāhole I* and *II*, *Wai'ola*, and *Kukui*, the Moon Court illuminated Hawai'i water law, giving greater depth and substance to underutilized constitutional and statutory provisions. Although the full range of the court's contributions extend beyond the scope of this article, three themes in particular distinguish the Moon Court's water law legacy: the public trust, indigenous rights, and the courage to uphold the law.

A. Defending the Public Trust

Under Chief Justice Moon's leadership, the Hawai'i Supreme Court upheld constitutional and statutory provisions, bringing them to life on the ground and in the resources and communities in greatest need of the law's protection. The court unambiguously affirmed the public trust by holding "that article XI, section 1 and article XI, section 7" of Hawai'i's constitution "adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai'i."[275] The court made clear that "[u]nder the public trust, the state has both the authority and duty to preserve the rights of present and future generations in the waters of the state."[276] In doing so, the Moon Court articulated a presumption for public use over private commercial interests, mandating that "any balancing between public and private purposes [must] begin with a presumption in favor of public use, access, and enjoyment."[277]

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[272] *Id.* (quoting *Wai'ola*, 103 Haw. at 442, 83 P.3d at 705) (emphases in original).
[273] *Id.* at 507, 174 P.3d at 346.
[274] *Id.* at 509, 174 P.3d at 348.
[275] *Waiāhole I*, 94 Haw. 97, 132, 9 P.3d 409, 444 (2000).
[276] *Id.* at 141, 9 P.3d at 453.
[277] *Id.* at 142, 9 P.3d at 454.

The Moon Court's decisions, especially in *Waiāhole I* and *II*, built upon the Richardson Court's unequivocal rulings in *McBryde*, *Reppun*, and *Robinson* that water resources are held in trust by the State for the benefit of the people. The Moon Court's decisions were essential given that the Richardson Court's decisions did not end the controversy over water in Hawai'i. The Richardson Court's rulings left no room to question the public trust over Hawai'i's water resources, yet opposition persisted as a range of interests challenged those holdings in the federal courts, the political arena, and beyond.[278] Moreover, the 1978 constitutional amendments and 1987 passage of the Water Code should have put to rest any lingering uncertainty, but as the *Waiāhole* litigation demonstrated, resistance to the very concept of the public trust continued.[279] The Moon Court considered and rejected this opposition, affirming and refining the legal and practical dimensions of the public trust, especially as it relates to water resources.[280]

B. Protecting Indigenous Rights

The Moon Court also built upon the Richardson Court's recognition of the role of Native Hawaiian practices and traditions in the evolution and current management of water resources. In *Robinson*, the Richardson Court acknowledged that "Native Hawaiian practices respecting water" provide a legal and cultural foundation "from which our water law ostensibly springs[.]"[281] In *Reppun*, the court similarly recognized that

> this judge-made system of rights was an outgrowth of Hawaiian custom in dealing with water. However, the creation of private and exclusive interests in water, within a context of western concepts regarding property, compelled the drawing of fixed lines of authority and interests which were not consonant with Hawaiian custom.[282]

In *Waiāhole I*, the Moon Court looked to Hawaiian practices and principles of water management to inform the scope of the public trust: "In view of the

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[278] *See, e.g.*, *supra* Part II.

[279] For example, several parties in *Waiāhole* argued that the public trust should not apply to ground water, *Waiāhole I*, 94 Haw. at 135, 9 P.3d at 447, while others claimed private commercial uses should be protected public trust purposes. *Id.* at 149-50, 9 P.3d at 437-38. The Moon Court rejected both propositions and emphasized the public nature of the trust. *Id.* at 138, 9 P.3d at 450. *See also* David L. Callies & Calvert G. Chipchase, *Water Regulation, Land Use and the Environment*, 30 U. HAW. L. REV. 49, 72-76 (2007) (disagreeing with the Moon Court's rulings regarding the public trust).

[280] *Waiāhole I*, 94 Haw. at 133, 9 P.3d at 445 (recognizing the trust's inclusion of "all public resources," but declining to articulate the precise scope of the trust).

[281] Robinson v. Ariyoshi, 65 Haw. 641, 675, 658 P.2d 287, 310 (1982).

[282] Reppun v. Bd. of Water Supply, 65 Haw. 531, 547, 656 P.2d 57, 68 (1982).

ultimate value of water to the ancient Hawaiians, it is inescapable that the sovereign reservation was intended to guarantee public rights to all water, regardless of its immediate source."[283] The Moon Court again expanded upon the Richardson Court's rulings by identifying Native Hawaiian traditional and customary rights and appurtenant rights among the handful of public trust purposes that have priority over private commercial uses.[284] In doing so, the court considered the "specific objective" and "original intent" of various Hawaiian Kingdom laws to "preserv[e] the rights of native tenants during the transition to a western system of private property."[285]

In *Wai'ola* and *Kukui*, the Moon Court outlined stringent requirements to protect indigenous rights by assuring, for example, that water use permit applicants bear the ultimate burden of demonstrating that a water use will not harm traditional and customary Native Hawaiian practices.[286] In both cases, Native Hawaiian practitioners objected to permits out of concern that pumping ground water would reduce the discharge of fresh water into nearshore marine areas where Native Hawaiians exercised traditional gathering practices.[287] The Water Commission dismissed the practitioners' concerns and concluded that no evidence in either case demonstrated that the wells would impact the exercise of traditional and customary rights.[288] In *Wai'ola*, the court ruled that "the absence of evidence . . . [is] insufficient to meet the burden imposed upon Wai'ola by the public trust doctrine."[289] In *Kukui*, the court similarly ruled that the "Commission impermissibly shifted the burden of proving harm to those claiming a right to exercise a traditional and customary native Hawaiian practice."[290] In light of these rulings, simply pointing to an empty record and claiming no impact to indigenous rights will no longer suffice; permit applicants bear an affirmative burden of demonstrating that a proposed use will not impact traditional and customary Native Hawaiian rights and practices, which the Moon Court also recognized and protected as a public trust purpose.

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[283] *Waiāhole I*, 94 Haw. at 135, 9 P.3d at 447.

[284] *Id.* at 137 & n.34, 9 P.3d at 449 & n.34.

[285] *Id.* at 135, 9 P.3d at 447. The Moon Court did not, however, merely accept at face value all claims and issues regarding indigenous rights in the context of water management. In *Waiāhole II*, the court rejected the Water Commission's misplaced attempt to justify IIFSs based on the "half approach," a claimed Native Hawaiian tradition of not diverting more than one-half of the flow of a stream because it "left unanswered the question whether instream values would be protected to the extent practicable." *Waiāhole II*, 105 Haw. 1, 12, 93 P.3d 643, 654 (2004).

[286] *See generally In re* Kukui (Moloka'i), Inc. (*Kukui*), 116 Haw. 481, 174 P.3d 320 (2007); *In re* Wai'ola O Moloka'i, Inc. (*Wai'ola*), 103 Haw. 401, 83 P.3d 664 (2004).

[287] *See generally Kukui*, 116 Haw. 481, 174 P.3d 320; *Wai'ola*, 103 Haw. 401, 83 P.3d 664.

[288] *See Kukui*, 116 Haw. at 499, 174 P.3d at 338; *Wai'ola*, 103 Haw. at 442, 83 P.3d at 705.

[289] *Wai'ola*, 103 Haw. at 442, 83 P.3d at 705.

[290] *Kukui*, 116 Haw. at 486, 174 P.3d at 325.

C. Upholding the Law in the Face of Opposition

As with Chief Justice Richardson's time at the Hawai'i Supreme Court, water issues remained highly political and contentious during Chief Justice Moon's tenure. Both courts faced fierce opposition as commercial and other interests questioned the legal basis for decisions and refused to accept the state of the law.[291] In *Robinson*, the Richardson Court pointed out that "[t]he reassertion of dormant public interests in the diversion and application of Hawaii's waters has become essential with the increasing scarcity of the resource and recognition of the public's interests in the utilization and flow of those waters."[292] Almost two decades later in *Waiāhole*, the Moon Court still found itself defending the public's interest in Hawai'i's precious water resources: "[I]f the public trust is to retain any meaning and effect, it must recognize enduring public rights in trust resources separate from, and superior to, the prevailing private interests in the resources at any given time."[293] The Moon Court also recognized the pressing need for proactive management of trust resources:

> [W]e simply reaffirm the basic, modest principle that use of the precious water resources of our state must ultimately proceed with due regard for certain enduring public rights. This principle runs as a common thread through the constitution, Code, and common law of our state. Inattention to this principle may have brought short-term convenience to some in the past. But the constitutional framers and legislature understood, and others concerned about the proper functioning of our democratic system and the continued vitality of our island environment and community may also appreciate, that we can ill-afford to continue down this garden path this late in the day.[294]

The Moon Court had the courage to respect both the letter and spirit of the law even when that position lacked universal support. This especially rang true in the Waiāhole controversy where the community faced overwhelming opposition from the government and other political and economic forces.[295] Rather than letting popular sentiment or powerful private interests dictate its decisions,[296] the court articulated "serious misgivings" about the political

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[291] *See, e.g.*, Callies & Chipchase, *supra* note 279.

[292] Robinson v. Ariyoshi, 65 Haw. 641, 676, 658 P.2d 287, 311 (1982).

[293] *Waiāhole I*, 94 Haw. 97, 138, 9 P.3d 409, 450 (2000).

[294] *Id.* at 190 n.108, 9 P.3d at 502 n.108.

[295] Sproat & Moriwake, *supra* note 39, at 277.

[296] *Waiāhole I*, 94 Haw. at 110, 9 P.3d at 422 (acknowledging that "this dispute culminated in a contested case hearing of heretofore unprecedented size, duration, and complexity"); *see also* Sproat & Moriwake, *supra* note 39, at 258-59 (noting that more than twenty-five parties were admitted to the case, including "many of the largest, wealthiest, and most powerful interests in the state, including Campbell and Robinson Estates (large landed estates and former

influences over the Water Commission's proceedings, which "strongly suggested that improper considerations tipped the scales in this difficult and hotly disputed case," and which "did nothing to improve public confidence in government and the administration of justice in this state."[297] The court's concerns about inappropriate political pressures reflected its overall conviction that the public trust must set higher standards beyond what the "present majority," or most powerful, happen to favor at any given time.[298]

The Moon Court grounded itself in Hawai'i's laws, history, and culture, and systematically confronted and resolved difficult issues with the tenacity to do what the law required and what was best for Hawai'i's water future, even if those actions did not particularly suit influential political and economic interests.[299] The Moon Court also demonstrated a commitment to upholding the rights of underrepresented groups, including Native Hawaiians and other community stakeholders, thereby preserving traditional practices dependent upon Hawai'i's natural and cultural resources that both deserve and require the law's protection. It took this kuleana, or responsibility, to heart: "As with other state constitutional guarantees, the ultimate authority to interpret and defend the public trust in Hawai'i rests with the courts of this state."[300]

IV. CONCLUSION

Ko'olau Ag, *Waiāhole I* and *II*, *Wai'ola*, and *Kukui* reflect the Moon Court's deep appreciation for the relationship between justice and flowing water in Hawai'i. The court's understanding of and respect for Hawai'i's indigenous culture and unique history provided invaluable context, which enabled the Moon Court to reaffirm and clarify the public trust over Hawai'i's water

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plantation land-owners), Kamehameha Schools (a large Native Hawaiian educational trust that at the time was the wealthiest private charity in the United States and the largest private landowner in Hawai'i), multinational corporations such as Del Monte, Dole, and Castle and Cooke, and land development and farm lobbies. Branches of the county, state, and federal governments, including the City and County of Honolulu Board of Water Supply, Department of Agriculture of the State of Hawai'i, and the U.S. Navy also joined the fray, all in favor of retaining the maximum stream diversions.").

[297] *Waiāhole I*, 94 Haw. at 127, 9 P.3d at 439.

[298] Sproat & Moriwake, *supra* note 39, at 278.

[299] *Waiāhole I*, 94 Haw. at 124, 9 P.3d at 436 (observing that, in *Waiāhole I*, the Windward Parties raised procedural due process claims, in part because of the then-Governor and Attorney General's involvement in the case, including "the governor's public criticism of the proposed decision, [and] the attorney general's personal appearance before the Commission in order to argue DLNR/DOA's exceptions to the proposed decision, and the dismissal of the deputy attorney general assigned to the Commission.").

[300] *Waiāhole II*, 105 Haw. 1, 8, 93 P.3d 643, 650 (2004) (quoting *Waiāhole I*, 94 Haw. at 143, 9 P.3d at 455).

resources. The court's willingness to defend the public's and indigenous rights was both courageous and crucial to the preservation of limited resources for present and future generations, clearing the way for fresh water to once again rejuvenate the natural ecosystems and human communities and cultures that depend on them. Through its rulings, the Moon Court has removed political and other structural diversions to enable water to once again flow with justice from mauka to makai.

The Moon Court did its part. Now, the impetus is on the Water Commission and the public trust's beneficiaries to ensure that water and justice will continue to flow so that ola i ka wai ola, ola ē kua'āina, life through the life-giving waters will bring life to the people of the land.